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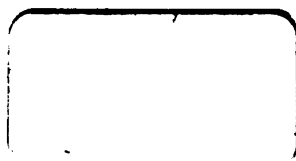
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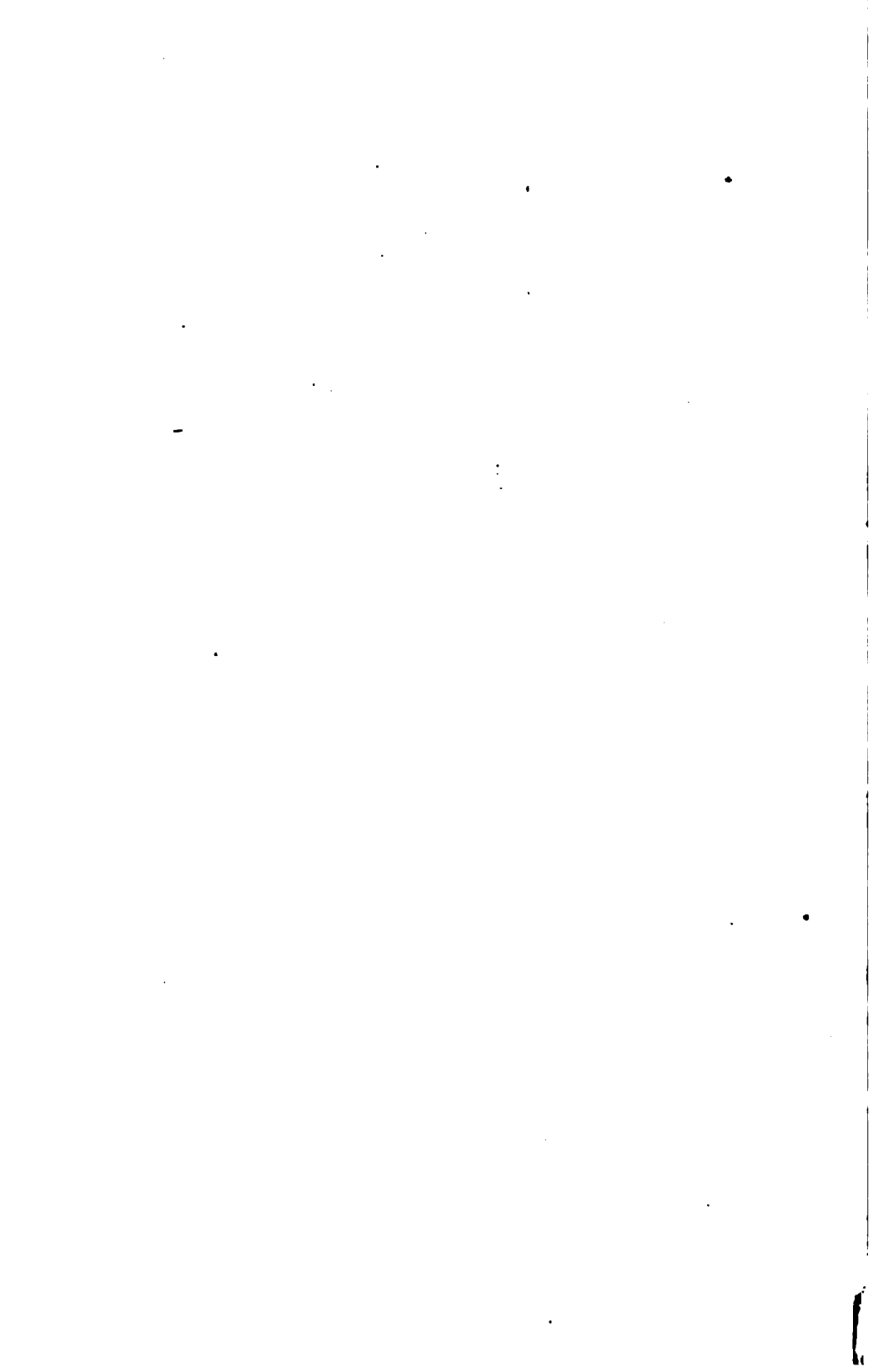
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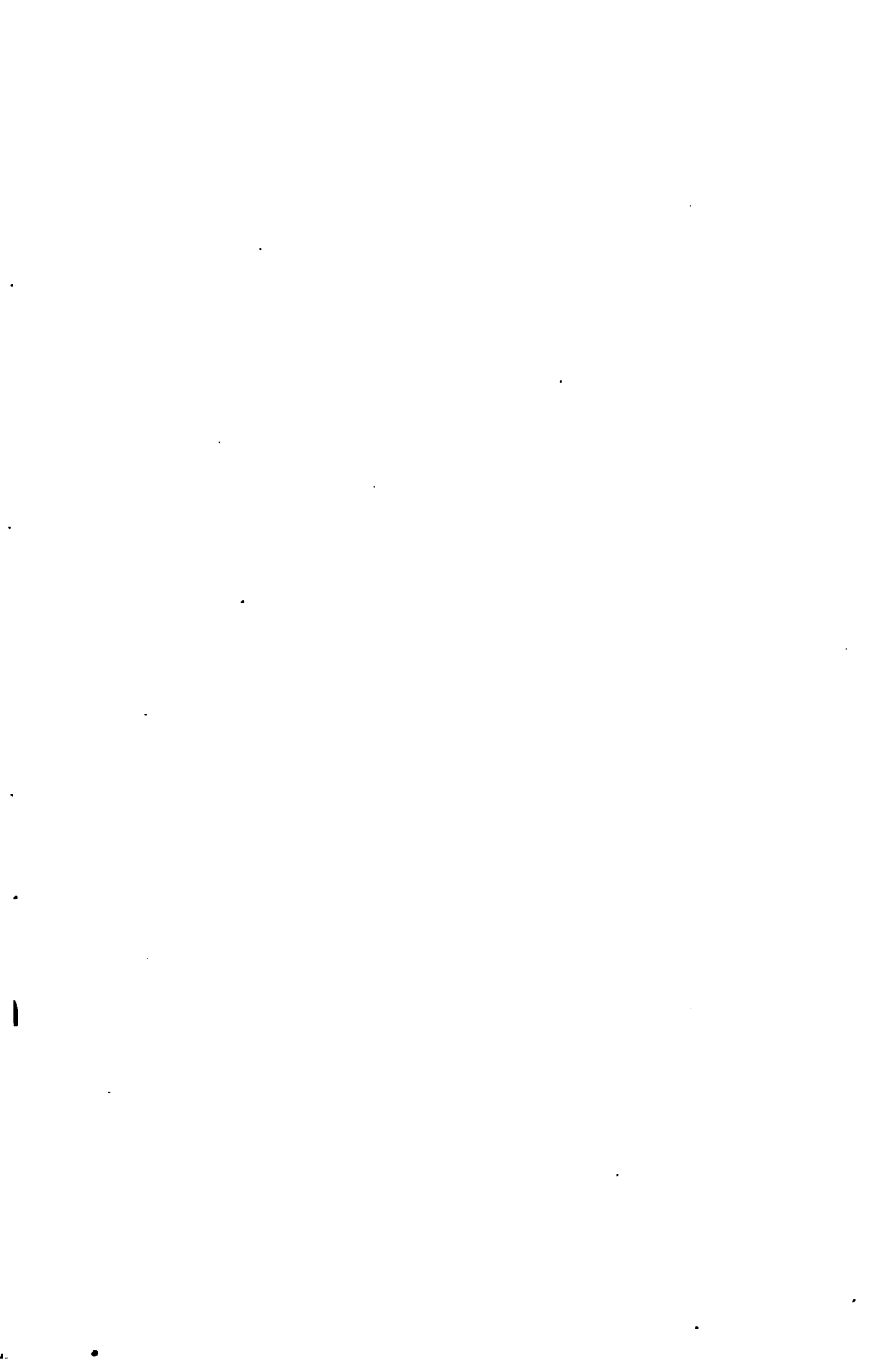


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REPORTS
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CITED, AND
STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

VOL. 16,

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JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. THEODORE P. DAVIS. * ‡
HON. ORLANDO J. LOTZ. * §
HON. GEORGE E. ROSS. *
HON. GEORGE L. REINHARD. *
HON. FRANK E. GAVIN. *
HON. DANIEL W. COMSTOCK. † ||
HON. URIC Z. WILEY. †
HON. WOODFIN D. ROBINSON. †
HON. WILLIAM J. HENLEY. †
HON. JAMES. B. BLACK. †

* Term of office expired December 31, 1896.

† Term of office began January 1, 1897.

‡ Chief Judge at May Term, 1896.

§ Chief Judge at November Term, 1896, until expiration of term of office.

| Chief Judge at November Term, 1896, after the expiration of Judge Lotz's term of office.

OFFICERS
OF THE
APPELLATE COURT

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1896, IN THE
EIGHTY-FIRST YEAR OF THE STATE.

BROWN, EXECUTOR, ET AL. v. HINES.

[No. 2,022. Filed September 23, 1896.]

HIGHWAYS.—*A Public Highway Annexed to a Town Becomes a Street.*
—Land which has become a public highway before its annexation to a town by twenty years' continued use thereof by the public as such, as provided by section 6762, Burns' R. S. 1894, becomes one of the streets of the town after its annexation, although such section of the statutes does not apply to the public streets of a town.

From the Tipton Circuit Court. *Affirmed.*

Thomas J. Kane and Ralph K. Kane, for appellants.

John F. Neal, for appellee.

LOTZ, J.—The city of Noblesville, by regular proceedings, ordered the improvement of Voss street within the corporate limits by grading and graveling the same. A contract for such improvement was duly let to the appellee and he made the improvement as ordered. This action was brought in the Hamilton Circuit Court, to enforce the assessment against the

Brown, Executor, *et al.* v. Hines.

lands of the appellant abutting on said street and benefited thereby. The venue of the cause was changed to the Tipton Circuit Court. That court tried the cause and made a special finding of the facts and stated conclusions of law, and rendered judgment for the appellee, enforcing such assessments against the appellants' lands.

The only questions presented for our consideration upon this appeal arise upon the conclusions of law.

The appellants earnestly contend that it appears from the facts that the way in front of the lands sought to be charged was not a public street of said city, and that the proceedings, so far as the same affected their lands, were null and void.

It is insisted that it does not appear, from the finding, that the way had ever been dedicated to the public, either expressly or impliedly, and that no proceedings had ever been taken to condemn the same for street purposes. The cases of *Shellhouse v. State*, 110 Ind. 509; *Tucker v. Conrad*, 103 Ind. 349; *Mansur v. State*, 60 Ind. 357, are relied upon to support this contention.

We do not find it necessary to follow the elaborate argument of counsel, for, as we view the case, there are a few controlling facts decisive of this controversy.

It appears from the finding that the original plat of the town of Noblesville was made and filed more than sixty years ago; that the appellants' land, now sought to be charged, abutted upon the north line of said plat; that about forty-three years ago the public commenced traveling on the south line of appellants' lands, and that forty years ago there was a well defined beaten traveled way, and that the same has been continuously and uninterruptedly used by the traveling public, and that it afterwards became known as

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Voss street, in said city, and was known as such at the time the improvement was ordered. Noblesville became incorporated as a town in 1850, and as a city in 1887. The appellants' lands were annexed to the corporation in 1871.

It clearly appears from these facts that the way had been traveled and used by the public for more than twenty years prior to being annexed to the town.

By section 6762, Burns R. S. 1894 (5035, R. S. 1881), which went into effect March 5th, 1867, it is provided that "All public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways;" etc. In construing this statute the Supreme Court, in the case of *Strong, Tr., v. Makeever*, 102 Ind. 578, said: "By the explicit and positive terms of the statute, that [twenty years'] use made the road a public highway. Under this statute, it is the twenty years' use that makes the road a public highway, and it is immaterial whether the use is with the consent, or over the objection, of the adjoining landowners. * * * * With the expiration of the twenty years' use, as in this case, the statute intervenes and declares the road to be a public highway regardless of its origin or the mere objections by landowners. The statute does not affect a remedy merely, but establishes a right." See also *Louisville, etc., R. W. Co. v. Etzler, Exr.*, 3 Ind. App. 562.

Under these authorities, the traveled way on the north end of appellants' land had become a public highway before the lands were annexed to the town. Being a public highway at the time of the annexation, its character was not changed thereby, but it still remained a public highway and became one of the streets of the town.

It is true that section 6762, *supra*, does not apply to the public streets of a city or town. *Tucker v. Conrad*,

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supra. But in the case at bar the twenty years' use constituted the way a public one before the annexation. The case of *Shellhouse v. State, supra*, and *Mansur v. State, supra*, do not apply, for there the ways were within an incorporated city.

It clearly appears that the way upon which the appellants' land abutted was a public street of the city of Noblesville, and should be charged with the costs of the improvement.

Judgment affirmed.

BEIST v. SIPE.

[No. 2,082. Filed September 23, 1896.]

SALE.—Contract.—An agreement by which A was to furnish to B a music box with a dropslot attachment, B to remit each week the collections therefrom, making up the amount to a certain sum if below that, until he had remitted \$250, at which time B was to own the box, with an option to A in case of default to sue for the balance due, or to refund one-half of the collections remitted and retake the box, is a contract of sale and purchase on which the first party can sue in case of a default in payment for the unpaid balance of the contract price.

APPEAL.—Pleading.—Answer.—Sustaining a demurrer to a paragraph of answer is not reversible error, although the paragraph is good, where the same defense alleged therein is set up in another paragraph which is not held bad.

CONTRACT.—Execution of, Without Reading.—A party cannot be relieved from a written contract upon the ground that it does not represent his understanding of the agreement, where he signed it without having it read or without reading it himself, unless he was induced to sign it by some misrepresentation.

From the Madison Circuit Court. *Affirmed.*

William A. Kittinger and Edward D. Reardon, for appellant.

Mark P. Turner and Bartlett H. Campbell, for appellee.

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ROSS, J.—This was an action upon the following written instrument, to-wit:

“ANDERSON, IND., Sept. 7, 1894.

“AUG. BEIST—We propose to supply you with a musical box, provided with a drop slot attachment, on the following explicit terms and conditions, which our agent is not authorized to change, alter, or vary in any manner or degree, viz: You to make all collections from the box and remit to us, at Cleveland, Ohio, on our order, on each Monday following this date, an amount equal to that collected by the box during the previous week, until such remittance shall amount to \$250.00, at which time we agree to give to you a receipted bill of sale of the box. Should the box at any time collect less than two dollars in any week, you to supply a sum sufficient to make such week's collection equal to two dollars. Upon your failure to remit any payment, as above agreed, the whole amount will become due and payable, or we may, at our election, refund to you 50 per cent. of the money paid us and remove the box, you forfeiting all claims thereto. You to give the box the same care as you do your other furniture and fixtures in the same room, and to keep it in repair, and you to place, nor allow to be placed, no other musical box in your place during this agreement.

[Signed] AUTOMATIC MUSIC Co.

“I accept the above propositions, this 7th day of September, 1894.

[Signed] AUG. BEIST.”

The first and second specifications of error assigned call in question the sufficiency of the complaint.

It is urged, on behalf of the appellant, that the instrument sued on is not a contract for the purchase of the music box, but is an agreement on appellant's

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part to remit to the appellee, weekly, whatever money the box should collect.

It is true, the article or contract does not contain the words bargain or sell, purchase or buy, and yet it does contain an agreement on appellee's part to furnish appellant with a "Musical Box," provided with a drop slot attachment, for which he was to collect from the box and remit to appellee weekly the amount collected in the box, until he had remitted the sum of \$250.00, and in the event the amount collected in the box during any week was less than two dollars, the appellant was to make up the deficiency until the remittance should equal two dollars. When the entire \$250.00 were remitted the appellee was to give to the appellant a receipted bill for the box. The language of the instrument is sufficiently clear to show an agreement to furnish and sell on the one part, and to purchase and pay on the other.

It is further urged that the complaint is insufficient because the instrument sued on is one granting to the appellee several rights dependent upon an election on his part, and that no facts are alleged showing such election and notice thereof to the appellant. This position we think untenable. The right to refund 50 per cent. of the remittance and to reclaim the box was a special right granted appellee, of which he could take advantage only by complying with the terms of the contract. But this right did not infringe upon appellant's right to pay for and retain the box. The right of appellee to claim a forfeiture could not be enforced if the appellant complied with his part of the contract and paid for the machine. Again, the right to declare such forfeiture was optional on appellee's part. He could declare such forfeiture only upon a return of 50 per cent. of the amount remitted. If he failed to return 50 per cent. of the remittances, his

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only remedy was to sue the appellant upon the contract for the balance due.

The third and fourth specifications of error assigned are predicated upon rulings of the court on demurrers to the fifth and sixth paragraphs of appellant's answer.

The record before us discloses that, on the 11th day of April, 1895, the appellee's demurrers to the fifth and sixth paragraphs of appellant's answer were sustained, and appellant given leave to amend such answers. On the 10th day of May, 1895, appellant filed an amended fifth paragraph of answer, to which a demurrer was filed by the appellee, and overruled by the court.

The third specification of error presents no question because there is no ruling upon which to base it. When the appellant was granted leave to amend his fifth and sixth paragraphs of answer, if he availed himself of the right, he waived the exception saved to the court's rulings on the demurrers thereto. So far as the fifth paragraph is concerned, he took advantage of the leave granted him and filed an amended fifth paragraph. The amended fifth paragraph was held good.

The sixth paragraph of the answer sets up the same defense alleged in the amended fifth paragraph, hence, if it be conceded that the sixth paragraph is good, which we seriously doubt, the ruling of the court in sustaining a demurrer thereto was harmless.

The fifth and last specification of error is: "The court erred in overruling appellant's motion for a new trial."

The reasons assigned for which a new trial was asked were:

"1st. The decision of the court is not sustained by sufficient evidence.

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"2d. The decision of the court is contrary to law.

"3d. The damages assessed by the court are excessive.

"4th. The assessment of amount of recovery is erroneous, being too large."

There is ample evidence to sustain the finding of the court. On the question as to whether or not, at the time the machine was placed in appellant's house, he agreed to purchase it, or simply understood it was being left with him, and that the contract he signed was represented to be merely a receipt, there is a sharp conflict in the evidence. That the appellant signed the contract is undisputed, but whether or not he read it before signing is not clear. If he signed it without having it read, or without reading it himself, that is his misfortune. It is nevertheless his contract, unless he was induced to sign it under some misrepresentations. The court below, hearing the evidence and having the witnesses and parties before it, has decided that the weight of the evidence preponderates in favor of the appellees. We see no reason for disturbing the finding of the court, either on the weight of the evidence or on account of the amount of damages assessed. The action was to recover the balance due under the terms of the contract. The value of the machine was the amount the appellant, by the terms of the contract, agreed to pay for it.

The finding and judgment were for the balance unpaid of the contract price.

Judgment affirmed.

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[No. 2,053. Filed September 23, 1896.]

MASTER AND SERVANT.—*Safe Place to Work Must be Provided.—Latent Defects.*—A servant has a right to assume, without looking for latent defects, that the master has done his duty in providing safe premises or working places for his servants, unless he has knowledge of the defects or can obtain such knowledge by the use of ordinary care. pp. 13, 14.

PLEADING.—*Complaint.—Damages for Personal Injuries.—Contributory Negligence.*—A general averment in a complaint in an action for personal injuries that plaintiff was free from contributory negligence is sufficient unless the facts pleaded in detail show that he was guilty of negligence notwithstanding such general averment. p. 13.

INSTRUCTIONS.—*Incomplete.*—The proper remedy for an alleged omission in giving an instruction, correct so far as it goes, is not by exception but by a request for an instruction supplying the omission. p. 14.

SAME.—*Contributory Negligence.*—On the issue of contributory negligence, in an action for personal injuries, it is error to instruct the jury that "contributory negligence on the part of the servant would not prevent him from recovering damages which he might otherwise be entitled to if by the exercise of ordinary care on the part of the master the consequences of such servant's negligence might have been avoided," when not limited to a case where the master's negligence was committed after he was aware of servant's danger. pp. 14-17.

From the Greene Circuit Court. *Reversed.*

Emerson Short, for appellant.

C. E. Davis and *W. V. Moffett*, for appellee.

REINHARD, J.—The appellee's complaint alleges that the appellant is the owner of and operating a coal mine near the town of Linton, in Greene county, Indiana, known as the Summit Coal Mine, and employs men therein, in the business and work of mining coal; that at the time of the injuries hereinafter mentioned, and long before, the appellee was an

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employe of appellant in said mine for hire; that said mine was then and still is an underground structure consisting of a main shaft about eighty feet deep, from which lateral horizontal excavations are made in the coal stratum of said mine, constituting what are known as entries and rooms in said mine; that a main or chief entry runs from the bottom of said main shaft, and that southward from the main east entry run a number of side entries, among which is one known as the sixth south entry from the main east entry; that from said sixth south entry excavations in the coal stratum of said mine, from which coal is taken in mining, are extended eastward; that said excavations are known as rooms and constitute working places for miners who work in said mine, which rooms are designated by numbers; that the safety of miners working in said rooms requires that said rooms should run parallel, and that there should be left at the coal stratum a pillar or rib, from six to eight feet in thickness, in order to prevent said mine from caving in, and to prevent the explosions from the shots of powder with which the coal must be loosened and detached in mining, from blowing through and doing injury to miners working in adjoining rooms; that such ribs or pillars are left by the miners working in said rooms as the work of mining progresses therein, and as coal is taken therefrom; that it is the duty of appellant, and was its duty at the time of the injuries complained of, to keep in its employment at said mine a competent mining boss, whose duty it then was to visit and examine every working place in said mine, at least every alternate day while the miners of such place are or should be at work, and to see that safety in all respects is assured therein, and, if found unsafe, to order and direct that no person be permitted therein except for the purpose of making it safe; that it

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was the duty of said mining boss and of the appellant to mark and lay out and plan the excavations of said rooms so that the pillars between such rooms should be and remain of the thickness and safety aforesaid, and to see that as the miners advance their excavations such pillars are maintained at the thickness aforesaid; and that it was obligatory on said mining boss and the appellant to perform all of said duties and preserve all of said precautions with reference to the room in which appellee was then on duty, and all of the rooms adjacent thereto; that at the time of the injuries mentioned, to-wit: on the 26th day of February, 1894, the appellee was sitting on a seat in a break-through or airway, made in the rib between rooms 13 and 14 in said sixth south entry, at a safe distance from a shot of powder which had just exploded, where he had been awaiting said explosion, and where he was in the line of his duty as laborer in said mine and employe of appellant, and without knowledge of the unsafe condition of the rib or pillar hereinafter mentioned, or that a shot was about to be made therein; that at said time, and for months prior thereto, appellant had in its employment a mining boss whose name was ———, but that said mining boss did not visit the said room 14, which was the room in which appellee was at work, and to which he had been assigned by appellant, nor any of the adjacent or adjoining rooms, each alternate day, or on any day; nor did he see that safety in all respects was assured in said rooms, or any of them; nor did he order and direct that no person, including the appellee, should be permitted in said room or rooms, except for the purpose of making it or them safe; nor did appellant perform, or cause to be performed, any of said duties; nor did said mining boss or the appellant see that the pillar or rib between said room 14 and room 15 was

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maintained at the requisite thickness to prevent blasts of powder from blowing through and injuring miners in said rooms, but that the appellant and said mining boss negligently, unlawfully and willfully failed and refused to perform any of said duties, and negligently, willfully and unlawfully so laid out and planned the excavation of said rooms that the lines thereof, to-wit: the south line of room 14 and the north line of room 15, aforesaid, converged as the excavations in said rooms advanced, and said rib between them became dangerously weak and thin, to-wit: of the thickness of two feet and no more, and negligently, willfully and unlawfully permitted said lines of said rooms, as the excavations therein advanced, so to converge and the said rib to become so dangerously thin, as aforesaid; and negligently, willfully and unlawfully permitted said rib to be and remain thin and unsafe, as aforesaid, and well knowing it to be in said unsafe condition, negligently and willfully assigned to work in said room 15 an inexperienced miner, who had not sufficient experience to detect said thinness of said rib, or to know the dangers thereof if detected; that on the 26th day of February, 1894, while in the discharge of his duties as employe of appellant, in said room 15, said inexperienced miner drilled a hole in said rib and placed powder therein for the purpose of shooting down coal in the usual way, and, not knowing of the thinness of said rib, fired said shot and exploded said powder; that by reason of the unsafe condition and thinness of said ribs, as aforesaid, and by reason of the aforesaid defaults of said mining boss in allowing it to become and remain so thin and in such unsafe condition, the explosion of said powder broke through said rib and against and upon the appellee while sitting in said break-through or airway, and with great force and

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violence threw and forced against him large lumps of coal and timbers of said mine, all without any fault or want of care on his part, and breaking his left arm, greatly bruising and lacerating his face, and breaking his ribs, etc., describing the injury and stating the expenses incurred for treatment, etc.

To this complaint the appellant demurred, and the overruling of the demurrer is assigned as error.

The complaint is not open to the objections urged against it. It was not necessary to aver that the appellee did not know that a shot was about to be fired in the room adjoining that in which he was seated, and that therefore he had, and could have had, no knowledge of the impending danger. There is a general averment, as we have seen from the complaint, of the freedom of the appellee from contributory fault. This is sufficient, unless the facts pleaded in detail show that he was guilty of negligence, notwithstanding such general averment. *Chicago, etc., R. R. Co. v. Smith*, 6 Ind. App. 262. No question is raised as to the sufficiency of the complaint on the subject of the assumption of the risk, and we are not required therefore to go into that question.

No other objections to the complaint are pointed out.

The overruling of appellant's motion for a new trial is assigned as error. It is insisted that the court gave erroneous instructions, the giving of which was made a cause in the motion for a new trial.

Instruction No. 3 1-4 is complained of as not stating the law correctly. In it the jury was instructed that a servant is not bound to inspect the premises for latent defects, and where he has no actual knowledge he is chargeable with a knowledge of such defects only as would be reasonably apparent, without inspection, to one who was giving due and reasonable atten-

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tion to the duties of his employment; and such servant has a right to assume, without looking for latent defects, that the master has done his duty in providing safe premises or working places for his servants, unless he had or could have obtained knowledge to the contrary, by reasonable observation. The instruction states the law correctly. *Island Coal Co. v. Risher*, 13 Ind. App. 98.

It is also complained that this instruction is not full enough. If this be true, it being correct as far as it goes, the appellant should have requested further instructions upon this point so as to meet its view of the law. *Keller v. Reynolds*, 12 Ind. App. 383.

The next instruction to which objection is made is as follows: "3 1-2. Contributory negligence on the part of the servant would not prevent him from recovering damages which he otherwise might be entitled to if by the exercise of ordinary care on the part of the master the consequences of such servant's negligence might have been avoided."

The general rule is well settled that contributory negligence of the plaintiff will defeat an action for damages sustained by him on account of the negligence of the defendant. There is, however, one well recognized exception to this rule, viz: when the contributory negligence is not contemporaneous and only a remote cause of the injury, the plaintiff can recover, if the defendant, by the exercise of ordinary care, might have avoided the injury. A recent authority states the doctrine on this point as follows: "Although contributory negligence may exist, yet it will not disentitle the injured party from recovery, if, by the exercise of ordinary care on the part of the defendant, the consequences of such contributory negligence might have been avoided." *Bailey Master's Liability*, p. 445. The learned author, in support of the text,

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makes liberal quotations from the decisions of courts of the highest standing, from which we take the following: "Although the rule is that, if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributing negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 558.

"A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accident are to a greater or less extent incident to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence." *Isbell v. New York, etc., R. R. Co.*, 27 Conn. 404, 71 Am. Dec. 78.

"An apt illustration of the rule," says Judge Bailey, "is found in *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 73, 3 Am. Rep. 663. The facts were that a barge of the plaintiff became grounded in the Hudson river. A

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steamboat owned and manned by the defendant collided with such barge, through the negligence of the officers in charge, by reason of which the barge was sunk. The defendant's boat, while out of the channel, came in contact with some obstacle, which shoved her bow directly towards the barge, and then, becoming unmanageable, ran into the barge. It was claimed by the defendant that the negligence of the plaintiff contributed to the injury on two grounds: First, that the tow was in the wrong place, and had committed the same fault alleged against the defendant, in endeavoring to sail east of the actual channel; and, second, was guilty of negligence in running aground, which contributed to the injury. The tow was grounded several hours before, and was entirely helpless at the time of the accident. The court held: 'The St. John [that being the defendant's boat] and all other passing vessels were bound to regard the actual situation of the tow, and to exercise reasonable care to prevent injury. It cannot be said that plaintiff's negligence contributed to the injury. Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury.' " Bailey Master's Liability, pp. 448, 449.

The same doctrine is declared by the Supreme Court of Ohio, in *Cincinnati, etc., R. W. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674.

Our own Supreme Court has also recognized the principle alluded to. *Evansville, etc., R. R. Co. v. Hiatt*, 17 Ind. 102; *Evans v. Adams Express Co.*, 122 Ind. 362, 7 L. R. A. 678.

It will be seen by an examination of the cases referred to that an instruction of the character of the one complained of in the present case is proper only

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upon the theory that the defendant's negligence was committed after it became aware of the plaintiff's danger. Had the instruction been properly limited to that kind of a case, under the evidence, it might have been sustained. *Indiana Stone Co. v. Stewart*, 7 Ind. App. 563. But it was not so limited. In the case just cited an instruction much like the one under consideration was condemned by this court. It was there said: "To say that if the master, by reasonable care, could have prevented the injury, he shall respond in damages, notwithstanding the contributory negligence, would be to nullify the whole doctrine, for the master would not, in any event, be liable, unless reasonable care upon his part would have prevented the injury."

The court having failed to qualify the instruction so as to bring the case within the exception to the general rule, we must hold that the giving of it in the form in which it was given constitutes reversible error.

Judgment reversed, with directions to grant appellant's motion for a new trial.

THE BEDFORD BELT RAILWAY COMPANY v. PALMER.

[No. 1,829. Filed September 24, 1896.]

EVIDENCE.—Expert Witness.—Hypothetical Question.—It is improper to ask an expert witness to give an opinion based upon his recollection of the testimony of another witness. The assumed facts upon which an opinion is desired should be stated hypothetically.

From the Monroe Circuit Court. *Reversed.*

F. M. Trissal, Matson & Giles and H. A. Lee,
for appellant.

H. C. Duncan, J. R. East and R. N. Palmer,
for appellee.

DAVIS, C. J.—This is an appeal from a judgment for \$3,100.00 against the appellant, in an action brought by the appellee to recover compensation for his services as an attorney.

The only error assigned is the overruling of appellant's motion for a new trial.

George O. Iseminger, an attorney, was asked this question by appellee:

"From what you heard Mr. Palmer testify here as to the amounts in controversy in all these cases, and the services rendered by him, and the amount he fixes for his services, state whether or not, in your opinion, such services were reasonably worth the amount he charged for them?"

The following objections to the question were stated: "It permits the witness to pass his opinion on a statement made by Mr. Palmer. An expert must state the facts himself on which he bases his opinion, and not give it on the statement of others. It is clearly incompetent." The objection was overruled and exception saved.

The witness then answered: "They were."

The action of the court in overruling appellant's objection to the question and in admitting the evidence is assigned as one of the causes in the motion for a new trial.

In our opinion the court erred in this ruling.

It was not proper to ask the witness whether appellee's opinion as to the value of his service was correct. The appellee testified as to his services and the value thereof. The witness Iseminger was not asked as to

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his opinion of the value of the services "based upon a statement of the facts assumed to have been proven," but he was asked to "base his testimony upon his recollection and construction of the evidence given in the case" by appellee. The rule applicable in such cases is correctly stated in *Craig, Admr., v. Noblesville, etc., Gravel Road Co.*, 98 Ind. 109, as follows: "We think the only safe rule in allowing an expert witness to give an opinion, based upon the testimony of others, is to require the assumed facts, upon which an opinion is desired, to be stated hypothetically; then the jury can judge whether the assumed facts, upon which the opinion is based, have been proved, and weigh the opinion as applicable to them."

The question propounded to the witness did not seek to elicit his opinion based upon his personal knowledge of the services rendered. The testimony of appellee covers sixty pages of typewritten manuscript, and the substance of the question asked the witness was whether the services described by appellee in his testimony were worth the amount he charged for them as fixed by him in his testimony. The facts were not admitted. Whether the facts as testified to by appellee were proved was a question for the jury.

If the appellee desired the opinion of the witness as an expert, he should have assumed the existence of a certain state of facts in a hypothetical question as the basis on which he desired his opinion. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, 420; *Deig, Exr., v. Morehead*, 110 Ind. 451, 460.

It is true there is other evidence sustaining the verdict. We cannot, however, assume that the result would have been the same in the absence of the testimony of the witness Iseminger. We may assume that appellee was entitled to recover something, and

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that a verdict would in any event have been returned in his favor for some amount, but we cannot assume that the amount would have been \$3,100.00. The value of services is largely a matter of opinion, and in the absence of the testimony of Iseminger the verdict might have been for a less amount.

Other questions are presented by the record, but as they may not arise on another trial, it is not necessary to consider them.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

LAKE ERIE AND WESTERN RAILROAD COMPANY v.
CITY OF NOBLESVILLE.

[No. 2,262. Filed September 24, 1896.]

PLEADING.—Complaint.—Violation of City Ordinance.—Penalty.—

In a suit to recover the penalty for a violation of a city ordinance, so much of the city ordinance as relates to the offense must be referred to in the complaint by number of the section or sections and the date of adoption.

SAME.—Evidence.—City Ordinance.—In a suit to recover the penalty for a violation of a city ordinance, the city is not required to aver or prove publication of the ordinance, unless this fact be denied by affidavit.

From the Clinton Circuit Court. *Affirmed.*

J. B. Cockrum, George Shirts, I. A. Kilbourne, W. E. Hackedorn, J. Q. Bayless, C. G. Guenther and A. B. Clark, for appellant.

J. F. Neal, for appellee.

GAVIN, J.—In a suit to recover the penalty for a violation of a city ordinance, so much of the ordinance as relates to the offense must be referred to in

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the complaint by number of the section or sections and date of adoption. *Green v. City of Indianapolis*, 25 Ind. 490; *Clevenger v. Town of Rushville*, 90 Ind. 258; Burns' R. S. 1894, section 3501.

Where, however, one section of an ordinance defines the offense and fixes the penalty, while the following section merely provides for the mode of publication, it is necessary to designate in the complaint only the former section and not the latter.

In such an action the city is not required to aver or prove publication of the ordinance, unless this fact be denied by affidavit. *Lake Erie, etc., R. R. Co. v. City of Noblesville*, 15 Ind. App. 697; *Green v. City of Indianapolis, supra*; Burns' R. S. 1894, section 3499.

Judgment affirmed.

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NEUBACHER ET AL.

[No. 1,651. Filed April 14, 1896. Rehearing denied Sept. 24, 1896.]

VERDICT.—Presumption.—Every presumption is in favor of the general verdict. *p. 29.*

SAME.—Interrogatories.—Where the evidence is not in the record, the answers to interrogatories will not be allowed to overthrow a general verdict, unless there is such antagonism upon the face of the record as is beyond any possibility of being removed by any evidence legitimately admissible under the issues. *p. 29.*

PRACTICE.—Theory.—Every case must proceed upon some theory; if a complaint is based upon one theory it can not be sustained upon some other. *p. 30.*

RAILROADS.—Complaint.—Immaterial Allegations Need Not be Proved.—An allegation in a complaint for personal injuries against a union railroad company under whose directions the trains of several different companies are operated, that the train which struck and injured plaintiff was a train of a designated company, is immaterial and need not be proved. *p. 30.*

SAME.—Crossing.—Negligence.—Presumption.—A person who is injured at a railroad crossing is presumed to be negligent; but this

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presumption is overcome by a general verdict returned by the jury and approved by the trial court. *p. 33.*

SAME.—Crossing.—Contributory Negligence.—One is not, as a matter of law, guilty of contributory negligence in failing to wait until a train going in one direction has passed far enough to enable him to see whether a train on an adjoining track is approaching from the opposite direction, where a large number of trains pass the crossing daily and the safety gates are open, indicating that no train is approaching. *pp. 33-41.*

SAME.—Crossing.—Violation of City Ordinance.—Negligence.—Failure to operate safety gates at a railway crossing, as required by a city ordinance, is negligence. *p. 37.*

APPEAL.—Contributory Negligence.—Verdict.—The burden of showing on appeal that a general verdict for plaintiff is wrong because plaintiff was guilty of contributory negligence, rests upon defendant. *pp. 46-54.*

From the Marion Circuit Court. *Affirmed.*

Baker & Daniels, for appellant.

L. B. Swift and D. W. Howe, for appellees.

REINHARD, J.—On a former appeal this case was reversed on account of an error of the trial court in directing a verdict for the defendants. *Neubacher v. Indianapolis Union R. W. Co.*, 134 Ind. 25.

The action is by Louis Neubacher against the appellant, The Lake Erie & Western Railway Company, and the Chicago, etc., R. W. Co., commonly called the "Panhandle," for damages for personal injuries alleged to have been received by Neubacher at the crossing of appellant's railroad and South Delaware street, in the city of Indianapolis. Appellant filed a demurrer to the amended complaint, which was overruled and an exception saved. There was an answer in general denial, trial by jury, and a general verdict in favor of appellee, Neubacher, and against the appellant in the sum of \$3,000.00. The jury also found in favor of the other appellees, the Lake Erie & Western and the Chicago, etc., R. W. Co.

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Appellant moved for judgment on the answers to the interrogatories returned by the jury, notwithstanding the general verdict, but the court overruled the motion and appellant excepted.

The errors assigned relate to the ruling of the court in overruling the demurrer to the complaint, in overruling appellant's motion, and sustaining appellee's motion for judgment on the answers to the interrogatories. The first mentioned error has been expressly waived. The second and third present the question of the appellant's liability under the amended complaint and answers to interrogatories.

It is insisted in argument, on behalf of appellant: 1. That the answers to the interrogatories disclose that the negligence upon which the jury held the appellant liable was not that or any of that charged in the complaint. 2. That the jury's answers to the interrogatories show that the appellee, Neubacher, was guilty of contributory negligence.

As to the appellant, the Indianapolis Union Railway Company, the complaint charges the following facts: That appellant had for years owned various railroad tracks in Indianapolis, crossing various streets in the city and entering the Union Depot; that for that time these tracks had joined the tracks of various other railroad companies, including those of the "Panhandle" and Lake Erie companies, whose tracks also run through said city; that such connections and tracks were the means by which such other companies reached the Union Depot with their trains; that the connecting companies pay the Union company a rental for such use of its tracks; that the "Panhandle" is a "proprietary owner" in the Union company and has representation on its managing board; that South Delaware street in said city runs north and south, east from the Union Depot, and is

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crossed by two groups of tracks 100 feet apart, the southernmost group being three tracks of the "Big Four" road and the other being composed of three tracks of defendant, the Union company; that the crossing is near the center of the city and many persons and teams cross there at all hours daily; that each of said groups of tracks accommodated the business of several roads, and great numbers of engines and cars passed over that street upon those tracks at all hours daily, in engines more than 200—two-thirds of which passed upon the north group; that a gatekeeper's box stood eighteen feet north of south group and west of the street, and safety gates stood south of the south group, and north of the north group, and could be operated by a lever in the street twenty-five feet east of the gatekeeper's box; that at the time of plaintiff's injury, the defendants, the Lake Erie company and the Panhandle company, and the other companies, used the north group to get to and from the Union Depot; that an ordinance of the city required moving trains to sound the bell while moving in the city, to run at not more than four miles an hour, and, while running backward that a watchman shall be stationed at the rear end to avoid accident; that another ordinance required that safety gates shall be erected, for the protection of the public, "at each of said crossings;" that a competent person shall be employed to operate the gates, who shall be on duty from 6 a. m. to 9 p. m.; that plaintiff, a worker in brass, at about 7 p. m., November 20, 1888, was going from his home to his shop; that in so doing he went north on Virginia avenue to its crossing of the Union company's tracks, thence west along the south side thereof, upon a path which had been for a long time much used by the public generally as a highway, with the knowledge and permission of the

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defendants, to said South Delaware street, a distance along the tracks of about 500 feet; that while so going west he was walking directly toward the Union Depot; that it was dark, and at the Delaware street crossing was a single gas lamp on the west side of Delaware street and near the south side of the north group of tracks; that, as he approached the crossing a passenger train of the Panhandle company, going west into the Union Depot, overtook him, moving on the south track of the north group—the track nearest to plaintiff—and that the engine of that train reached the east side of Delaware street at about the same time plaintiff reached that point; that that train consisted of an engine and several cars; that no other train was then in sight or hearing; that there was no flagman at said crossing to warn travelers of trains, nor did any of the defendants have there any means of giving such warning which was made use of; that plaintiff stood upon the east sidewalk until the Panhandle train had passed; that the safety gates were open; that no operator was at the operating station; that no attempt to close the gates was made; that no flagman was at said crossing; that no warning was given of an approaching train; that, plaintiff having been all the time looking and listening for trains, seeing and hearing none, and not knowing that one was approaching, and not being warned by defendants, or either of them, of the approach of any other train, and believing that he might safely cross the north group of tracks, walked north on Delaware street over said north group of tracks—not later than 8 p. m. of said day—when he was struck on said crossing by a train of cars of the defendant, the Lake Erie & Western Railroad Company, backing upon the said second track (of the north group) eastward by the side of the other train and hidden by it, down from said depot to

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its yards, and was knocked down by the same and greatly injured (describing the injuries); that said injuries were caused without any fault of plaintiff, and were caused solely by the negligence of the defendants. After the foregoing, by way of preamble, the complaint proceeds to charge as negligence the following: That defendants, and each of them, negligently ran said trains, as aforesaid, so that the sound of the bell, if said bell was being rung, and the noise of the engine and rumble of the said Lake Erie & Western Railway train were drowned by, and were not distinguishable from the sound of the bell which was being rung, and the noise of the engine and rumble of the cars of said Chicago, St. L. & P. R. R. train; and the defendant Indianapolis Union Railway Company negligently allowed said trains to be so run; that the defendants, and each of them, negligently ran said trains, as aforesaid, so that the approach of said Lake Erie & Western Railway train to said crossing was hidden by the said C., St. L. & P. train from the plaintiff and any other person about to go upon said crossing; and the defendant, the Indianapolis Union Railway Company, negligently allowed said trains to be so run; that defendants, and each of them, negligently ran said trains, as aforesaid, so near together that the signals required by law of said L. E. & W. R. W. trains were rendered unavailing, and the defendant, the Indianapolis Union company, negligently allowed said train to so run; that the defendant, the L. E. & W. R. W. Co. negligently ran its train, as aforesaid, over said crossing, and upon plaintiff at a greater rate of speed than four miles an hour, and the defendant, the Indianapolis Union Railway Company, negligently allowed said train to be so run; that defendants, and each of them, negligently failed to have a flagman at

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said crossing at said time, to warn persons about to cross of approaching trains, or to have and use any other adequate, feasible, and reasonable means of giving such warning; that defendants, and each of them, negligently failed to close said gates; that defendants, and each of them, at said time, negligently failed to have a gatekeeper at said crossing to close said gates; that defendants, and each of them, negligently failed at said time, to have, maintain, and close the safety gates on the south side of said crossing; that defendants, and each of them, negligently failed, at said time, to have at said crossing a flagman, provided with proper and conspicuous signals to warn persons about to cross of the approach of trains; that defendants, and each of them, negligently ran, or allowed to be run, said L. E. & W. train over said crossing and upon plaintiff, as aforesaid, without giving plaintiff proper and timely notice of the approach of the same; that by reason of the aforesaid negligence of defendants, plaintiff was injured, as aforesaid.

Appellant's counsel, in their brief, have separated the several acts of negligence charged in the complaint, and stated them as follows:

1. Negligently allowing two of appellant's licensees, the Lake Erie and Panhandle companies, in using its parallel tracks at Delaware street, to run a west bound train of the Panhandle (pulling head on) and an east bound train of the Lake Erie (backing) over the crossing at almost the same time, and in so doing, the Panhandle train obstructed plaintiff's view of the east bound track and of the Lake Erie train backing east thereon, and the noise of the bell of the Panhandle train and its rumble obliterated and rendered inaudible to the plaintiff the rumble of the Lake Erie train and of any warning it may have been giving by bell or otherwise.

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2. That the Union company negligently allowed these two trains to so run so near together that the signals required by law of the L. E. & W. train were unavailing.

3. That the Union company negligently allowed the Lake Erie train to run over the crossing and upon plaintiff at a rate of over four miles an hour, in violation of the city ordinance.

4. That the Union company (with the other defendants) negligently failed, at said time (time of the passing of the trains mentioned), to have a flagman at the crossing, or to have or use any other adequate, feasible, and reasonable means of giving warning.

5. That the Union company (with the other defendants) at said time negligently failed to have a gatekeeper at said crossing to close the gates.

6. That the Union company (with the other defendants) at said time, negligently failed to close the gates.

7. That the Union company (with the other defendants) negligently failed, at said time, to have, maintain and close safety gates on the south side of the crossing.

8. That the Union company (with the other defendants) negligently failed, at said time, to have at the crossing a flagman provided with proper and conspicuous signals to warn travelers of approaching trains.

9. That the Union company (with the other defendants) negligently ran or allowed said Lake Erie & Western train to be run over the crossing and upon plaintiff, as aforesaid, without giving plaintiff timely notice of the approach of said L. E. & W. train.

The appellant argues that it was called to meet these issues, and none other; that if it did not (1) omit

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to do, or do, or allow to be done, any of the things charged as negligently omitted, done, or allowed to be done, at the time the train of its licensee, the L. E. & W. Co., was approaching the crossing from the west on the east bound track at the time of and just before a collision between the L. E. & W. train and plaintiff, then the case made against it in the complaint was not proved, and it should have had judgment. If the plaintiff did not (2) prove his freedom from fault contributing to his injury, the appellant should have had judgment.

The jury were required to answer a large number of interrogatories, 119 in all. We shall not undertake to set them out in this opinion.

The evidence is not in the record.

Of course, every presumption is in favor of the general verdict. If there were no answers to interrogatories, the presumption would be conclusive that the evidence makes out a case in favor of the plaintiff (appellee), according to the allegations of the complaint. But it is claimed that the answers to the interrogatories establish a different case from that stated in the complaint. If this is so, the answers to the interrogatories must clearly show it, for they can be allowed to overthrow the general verdict only when there is such antagonism upon the face of the record as is beyond any possibility of being removed by any evidence legitimately admissible under the issues. *Gaar, Scott & Co. v. Rose*, 3 Ind. App. 269, 275; *Baldwin v. Shill*, 3 Ind. App. 291, 298; *Estate of Reeves v. Moore*, 4 Ind. App. 492; *Walter A. Wood, etc., Machine Co. v. Irons*, 10 Ind. App. 454, 458; *Phillips v. Michaels, Gdn.*, 11 Ind. App. 672; *Chicago, etc., R. R. Co. v. Zimmerman, Admx.*, 12 Ind. App. 504; *Louisville, etc., R. R. Co. v. Cronbach, Admr.*, 12 Ind. App. 666, 674.

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It is a familiar rule that every case must proceed upon some definite theory, and that if a complaint is based upon one theory it cannot be sustained upon some other. The allegations and the proof must correspond, else there can be no recovery. *Becker v. Baumgartner*, 5 Ind. App. 576; *Louisville, etc., R. R. Co. v. Godman*, 104 Ind. 490; *Evansville, etc., R. R. Co. v. Barnes*, 137 Ind. 306.

Hence, the negligence charged in the complaint, or some of it, must be made out by the evidence. It is not sufficient to prove some other negligence with which the defendant might have been, but was not charged.

It was charged in the complaint that the train which struck the appellee and inflicted his injury was a Lake Erie & Western train. The answers to the interrogatories state that the jury do not know what train it was, nor whether it was a passenger or freight train. This we regard as equivalent to a finding that there was no evidence that the train which ran upon the appellee was a Lake Erie & Western train, and hence it must be admitted, we think, that that portion of the complaint which alleges that the appellee's injuries were received from a Lake Erie & Western train was not established. It is not essential, however, that every averment in a complaint should be proved. It is sufficient if the material allegations be established. Was this such an allegation as was required to be proved as laid?

We do not regard the allegation as to the identical train that injured appellee as material. All the trains in and about the Union Station were operated under the directions of the appellant. It was just as responsible for one as the other. Whether the appellant allowed a Lake Erie train or a train belonging to any

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other company to commit the negligent act is of no consequence, if it permitted it to be done at all and the consequences ensued which are charged in the complaint.

If the appellant had owned all the trains that were being operated in and about the Union Depot, and it had been averred in the complaint that the train which injured the appellee was train No. 5, when in fact it was train No. 4, we apprehend it would hardly be claimed that this was a fatal variance. So, in this case, the name or description or ownership of the train cuts but little, if any figure. The gist of the action did not lie in the infliction of the injury by reason of the ownership of the particular train that ran into the appellee. The complaint would have been good as against appellant without stating whose train it was.

The appellant's duty was to see that none of the trains were operated in such a way that the signals required by them, or any one of them, were unavailing; not to permit such trains to be run at a greater speed than four miles per hour; to have a flagman at the crossing and to use other adequate means of giving warning; to have a gatekeeper to open and close the gates at the crossing when proper; to see that the gates were closed when a train was about to pass the crossing; not to allow any train to run over a crossing and upon a pedestrian thereat without giving the required notice of the approach of such train. The violation of these duties were the fundamental charges contained in the complaint and which the appellant was required to meet, and not the averment as to the particular kind of train it was which ran upon the appellee, or to whom it belonged, or how it was numbered or otherwise described, and the question is, to what extent, if any, were these charges established?

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In view of the fact that the appellant had a large number of parallel tracks at its station, and was in the very nature of things required to operate and cross over these tracks some 200 trains daily, some of which would be likely to cross at the same time and in opposite directions, and in view of the fact that many bells might be ringing, and whistles blowing at the same time, because of these and other matters, showing the great and constant danger to pedestrians and others desiring to pass said crossing at any time, it became necessary, as alleged, to adopt greater precautions than might have been otherwise required. The gist of the negligence, then, was in failing to adopt the necessary and required precautionary measures, in doing, or omitting to do, acts which induced appellee to go upon the crossing when it was unsafe by reason of an approaching train, and in violating the ordinances as to maintaining gates and concerning the rate of speed at which trains should run. The presumption prevails (in the absence of the evidence) that all these things were proved, unless it be overcome by the direct finding of the jury in the answers to interrogatories.

If we grant that the jury's finding is such that no recovery can be had upon the alleged negligence in allowing the running of the trains at an illegal rate of speed, there is still enough left not to antagonize the general verdict as to other negligent acts charged. The general verdict is a finding in favor of appellee on every material point, and unless the answers to interrogatories come squarely in conflict with it upon some point or points material to the recovery, the general verdict must stand, although it is in conflict, in other respects, with such answers of the jury.

The same is true respecting the question of contributory negligence. Antecedent to any verdict, it is

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true that, under the authorities in this State, there is a presumption that one who was hurt at a railroad crossing by a passing train was negligent. *Smith v. Wabash R. R. Co.*, 141 Ind. 92. This presumption, however, is overcome by the general verdict. Whenever such verdict is returned and approved by the trial court the presumption named ceases to exist and gives way to the contrary presumption that everything has been shown to entitle the plaintiff to such a verdict. Hence, if the defendant asserts that the verdict is wrong because of a variance between the complaint and the proof, or because the plaintiff was guilty of contributory negligence, the burden is upon such defendant to establish the assertion. This may be done, we grant, by the answers of the jury to interrogatories, but these must disclose such a state of facts in relation to the variance or contributory negligence of the plaintiff, as will clearly antagonize the general verdict and overcome the presumptions attending it.

The answers to interrogatories show the following as to the place and manner in which appellee was injured: Delaware street is ninety feet wide, runs north and south, and crosses Pogue's run at a point 450 feet west of the intersection of Virginia avenue and Alabama street, 450 feet east of Pennsylvania street, 1,170 feet east of the west side of Meridian street (east end of Union Depot), and all of these streets (Virginia avenue excepted) run parallel to Delaware street. South of Pogue's run, Delaware street was crossed by a group of three tracks, known in this case as tracks Nos. 1, 2 and 3, and north of that stream by a group of five tracks, known in this case as tracks Nos. 4, 5, 6, 7 and 8. The two groups were separated by a bridge over the stream 100 feet long and of the

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full width of Delaware street, including its sidewalks. The south group of tracks was in no way connected with the accident. The north group consisted of parallel tracks. No. 4 was next to and twelve feet north of the bank of Pogue's run; No. 5 was 7 3-10 feet north of No. 4, and No. 6 was 7 5-12 feet north of No. 5, and from track 6 to the north "safety gate" it was 6 feet. Nos. 7 and 8 were further north, and had been abandoned as railroad tracks and cut off from any railroad connection long before the accident. These tracks were all standard gauge, 4 feet 8 inches. Track 4 was the Union company's west bound main, and track 6 was a Panhandle switch. Tracks 4 and 5 ran parallel and straight, upon about a level grade from Alabama street to a point about 90 feet west of Pennsylvania street. Appellee walked along this 12 foot strip of ground north of Pogue's run and south of track 4 from the intersection of Virginia avenue (a diagonal street) and Alabama street, to the east sidewalk of Delaware street. When he reached that point a Panhandle passenger train going west on track 4, consisting of an engine at the west end, and four or five cars, overtook him and he stopped on the east sidewalk and stood about six feet south of track 4 to allow that train to pass him. Its headlight was burning and was casting its light to the west; its bell was ringing and it was running at about four miles an hour. He stood there until the rear car of the Panhandle train had passed him about two feet, and then walked directly north, on the east sidewalk, over track 4, and the space between that and track 5, without stopping, and while he was crossing track 5, was struck by the east end of the east car of a train backing east on that track, after dark, between 6:30 and 7 p. m. Plaintiff had passed over the crossing almost daily—by day and night—for years, but had ob-

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served that safety gates were operated by day, and that at night a flagman, with red lamp signal, was used instead of the gates. As he came west to Delaware street, and while he stood there he observed that the south safety gate was open and was not operated for the passage of the west bound train, and it was so dark that he could not see the south gate, and knew nothing about whether it was being operated or not. At the time the west bound train crossed over and when the train which struck appellee was crossing, and while appellee was attempting to pass the crossing, the appellant's flagman was on Pogue's run bridge, "flagging trains," but the appellee failed to see him. Appellee, as he stood waiting for the west bound train to pass him, knew that it was—while near him—between him and track 5, and that it cut off the view of that track and of trains thereon, if any, and he knew and had in mind that the noises made by the west bound train might prevent his hearing the noises made by any train that might be coming east on track 5. It was the practice of the appellant, on the day of the accident, and for several months prior thereto, to operate the two safety gates at the Delaware street crossing named in the complaint, as a warning to travelers on the street, from 6:30 o'clock a. m. until dark, and from dark until 9 o'clock p. m. to substitute a flagman with a red lantern, who would signal with such lantern to travelers on the street when the crossing was not safe, but appellee did not know this. The ordinance, however, required the appellant to operate the safety gates at all times when trains were passing, up to 9 o'clock at night. The appellee received no signal or invitation to cross or not to cross from the flagman, except that the gate was open. As soon as the west bound train had passed him, the appellee started to cross the tracks north, and when he had

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reached track 4, on which the west bound train had passed, said train had only passed him by eight feet.

The jury, in answers to interrogatories, also stated that if appellee had waited on the south side of track 4, or upon track 4, until the west bound train had moved farther west (how far west or how long the appellee should have waited they do not state), he could, by looking and listening, have seen and heard the east bound train in time to avoid the injury. They also found that he did not hear the east bound train because of the confusion of noises of the two trains, and he did not see it because the west bound train obstructed his vision. They expressly found that he looked both east and toward the Union Station (west) after starting across the track.

In answer to a question the jury also stated that they did not know why appellee did not see the train with which he collided in time to avoid it; and to another question, they answered that the train was not in plain sight.

We do not think the answers to the interrogatories conclusively show a case of negligence different from that stated in the complaint. It is shown that at least one of its legal duties was violated by the appellant as charged, viz: the duty of opening and closing the safety gates. There is nothing to show that the appellant was exempt from the performance of this duty after nightfall. On the contrary, it was its duty to operate the gates till 9 o'clock p. m. It is true appellee did not pass through the north gate himself, but when he saw it open, in the absence of a clear showing that he knew it was not being operated at night, he had the right to assume, we think, that it was safe to pass over the tracks, else the appellant would have closed the gate.

It is also true, as appellant's counsel contend, that

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appellee saw the gate remain open while the west bound train was passing, but this was not conclusive evidence that the gate was not being operated. Just what the effect of such knowledge was we cannot say, as it was a question for the jury. The appellee saw no flagman and saw no signal of danger. Did he not have the right to assume, therefore, that it was safe for him to cross? The jury had a right to conclude that he did.

A feature of the negligence charged, or, perhaps, more correctly speaking, a reason for the requirement of special precautionary measures, was the running of trains so closely together on the tracks as to cause the noises made by such running to prevent a person attempting to cross, from hearing the distinct sound of the approaching train or its signals. To permit such noises and the passing of trains at such short intervals was not necessarily negligence, but it necessarily created additional danger to the pedestrian who might desire to cross, and brought with it the necessary requirement of providing such signals of warning as would be sure to apprise travelers over the crossing of the approach of trains. One of the precautionary measures was the ordinance requiring safety gates to be erected and operated. The failure to maintain and operate them, there, up to 9 o'clock at night, was in plain violation of the ordinance and was negligence. This negligence was charged in the complaint, and it is not shown that there was any failure to prove it. Even if it had been permissible to substitute the flagman before 9 o'clock, it was not shown that the latter gave any available signals. .

Under the circumstances, we also think the question of contributory negligence was one for the jury. The mere fact that the appellee did not wait until the west bound train was so far out of the way as to en-

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able him to see and hear whether a train might not be approaching from the west was not necessarily negligence. Whether it would or would not be negligence contributory to the injury is owing to the peculiar circumstances surrounding the occurrence. There might have been a number of reasons why it would not have been prudent for him to wait. He might have been confused by the lights or other objects, as the jury found, and indeed, for aught that appears, there might have been engines on the tracks which rendered it necessary for him to act promptly. It is not claimed that the appellee failed to look and listen as far as it lay in his power to do so. Indeed, the contrary is directly found. The chief complaint seems to be that he did not wait for the west bound train to get so far beyond him as to enable him to ascertain whether a train was approaching from the west to the east. The fact that the safety gate was open was an indication that no train was approaching. *Pennsylvania Co. v. Steigmeir*, 118 Ind. 305. When the facts and circumstances are such as to have a tendency to mislead one about to pass such a crossing, the law will not hold him to that strict accountability that it would under ordinary conditions. In all such cases the question of contributory negligence is for the jury. *Grand Rapids, etc., R. R. Co. v. Harrington*, 131 Ind. 426; *Mayo v. Boston & Maine Railroad*, 104 Mass. 137.

It is expressly held in the case last cited that the mere fact that one passing over a railroad track at a highway crossing begins to cross at a time when his view along the tracks is obstructed by the departing train, is not conclusive that such person did not use due care. Precisely the same point was also decided in *Philadelphia, etc., R. R. Co. v. Carr*, 99 Pa. St. 505. In that case the court was asked to charge the jury as

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follows: "The fact that a traveler stops and waits until a passing train gets by does not absolve him or her from looking and listening for trains approaching upon the other track in an opposite direction, and a traveler waiting for a train passing in one direction, must wait sufficiently long so that the train shall not prevent him or her seeing a train approaching in an opposite direction. If, therefore, the jury believe that Mrs. Carr, after stopping east of the railroad at Diamond street while the out train was passing, started across at a time when that train prevented her seeing the incoming train, she was guilty of negligence, and cannot recover."

The court below refused to give this instruction, but charged as follows: "I have already told you that it was Mrs. Carr's duty on approaching the track with a view of crossing it, to look and listen, to look in both directions, and listen for the approach of trains on either side, and I also said, or it was a necessary inference from it, that if she was delayed in this case, by any cause—the approach of the up train in the case in hand—it would be her duty again to look in both directions and listen before setting out. I am asked to say to you, however, that if under those circumstances a train which passed up the road shut out any portion of the road from view, it would be her duty to wait until that obstacle to vision was removed, and that if she did not do so, it would necessarily be negligence, and preclude her recovery. What I say is, that it would have been a wise and proper precaution, as the event shows. Whether the omission of that precaution be negligence would depend upon circumstances, and I am not willing to take upon myself the responsibility of saying that under the circumstances in this case she would necessarily be guilty of negligence in not waiting until the view of the other track

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was entirely clear. That is for the jury to consider. If the jury find that she was negligent, then the consequence would follow which has been already stated."

The Supreme Court upheld this instruction, saying: "The learned judge said all that could be said when he charged, that the act of the plaintiff in crossing as she did, might be negligent according to the circumstances, and the force of these he properly left to the determination of the jury. In this there was no error. We think the time has arrived when it would be well for all railroad companies, whose tracks cross the streets of cities and towns at grade, to protect all the street crossings with gates. The growing practice in this direction deserves commendation."

Although the question as to what constitutes "due care" on the part of one about to pass over a railroad crossing is a legal one, such person being required to listen for signals, notice warning signs, and look attentively both ways for approaching trains, yet whether the surroundings are such as to admit of these precautions is always a question to be determined by the jury, except in cases where all the ultimate facts have been found in a special verdict, and where only one inference can be drawn from such facts. *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39; *Smith v. Wabash R. R. Co.*, *supra*.

In the case at bar there is no special verdict, the large number of interrogatories and answers thereto being supplemental to the general verdict only. There is nothing in the answers to the interrogatories which necessarily leads to the conclusion that if the appellee had properly exercised his faculties he would not have been hurt. It is difficult to lay down any rigid rule as to the exact moment a pedestrian who desires to pass a crossing of the character of the one

we have here to deal with, must start after a train has passed, or how long he shall be required to wait. With the large number of trains and individual engines that almost constantly pass over these tracks, it would be a harsh rule indeed which would require the traveler to wait until such train had gone a sufficient distance to enable him to see if another was coming from the direction which the passing train had taken, as in the time thus required there might be engines or cars approaching from the opposite direction, and if he were compelled to wait till all had passed, it might never be possible for him to cross without incurring the risk of being chargeable with contributory negligence.

We have here a crossing containing a large number of parallel tracks upon which trains and single engines are constantly passing and repassing, to the number of hundreds in a single day. The circumstances attending the attempt to pass such a crossing are of course entirely different from those which usually prevail at a crossing in the country, or even in a city where the track is but a single or double one. The rules sought to be invoked by appellant's learned counsel as to the quantum and kind of care required of a traveler about to go over a crossing are not so arbitrary or unbending as to be equally enforceable under all circumstances and in every surrounding. Such rules are enforced only when the circumstances make them reasonable. 2 Sher. & Redfield Negl. (4th ed.), section 477.

That in such cases the question of negligence or contributory negligence is usually one for the jury, see further: *Young v. Detroit, etc., R. W. Co.*, 56 Mich. 430, 23 N.W. 67; *Geveke v. Grand Rapids, etc., R. R. Co.*, 57 Mich. 589, 24 N.W. 675; *Vicksburg, etc., R. R. Co. v. Alexander*, 62 Miss. 496; *Kellmy v. Mo.*

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Pac. R. W. Co., 101 Mo. 67, 13 S.W. 806; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N.W. 270; *Smith v. Savannah, etc., R. W. Co.*, 84 Ga. 698, 11 S. E. 455; *Bare v. Pennsylvania R. Co.* 135 Pa. St. 95, 19 Atl. 935.

Judgment affirmed.

ON PETITION FOR REHEARING.

REINHARD, J.—Appellant's learned counsel make a strong and plausible argument in their brief on petition for a rehearing in support of the position that appellee was shown to be guilty of contributory negligence in attempting to pass over the railway crossing so soon after the passing of the west bound train, and at their urgent insistence we have given the questions involved a second careful consideration. There is much to be said, it must be admitted, in favor of the position taken by counsel, and there are cases which, in a general way, and without careful analysis, would seem to go far toward supporting their view.

As to the question of the identification of the train which it is charged inflicted the injury upon the appellee, counsel contend that in view of the jury's answer to an interrogatory in which it is stated that they did not know what train it was that ran upon the appellee, that it is impossible for this court to hold properly that such train was a train belonging to one of the lessees of the appellant—a fact which it was probably necessary for the jury to find before they could find a verdict against the appellant. But we do not think, on the other hand, that it would be proper to presume, in the face of the general verdict, that the train was one that had no right at all to enter the depot—in other words, that it was “a trespassing train,” as counsel want us to assume. The evidence is not

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in the record, and we are not permitted to look to it for information. If it was essential to prove that the train was one of those operated within the Union belt and under the control of appellant, this finding must be deemed by intendment to be included in the general verdict, and the answer of the jury that they did not know what train it was, would not necessarily contravene or overcome such presumption. It may have been proved upon the trial that all the trains running into and out of the Union Depot are trains of appellant's leasees, and are operated by appellant, or under its direction. If so, the evidence was sufficient upon that point. There was no fatal variance between the case made by the answers to the interrogatories and that counted upon in the complaint, as to this point.

We pass then to the question of contributory negligence. If failing to wait for the train to pass a sufficient distance to enable appellee to see whether another train was approaching, was negligence on the part of appellee, it must have been so because the peculiar condition of affairs required him to wait. But we cannot say, in view of the general verdict, what all the conditions were. It must never be forgotten that we are not dealing here with a special, but a general verdict, and answers to some interrogatories. The learned counsel treat this controversy throughout as if the interrogatories and answers thereto constituted a special verdict, and the jury had not returned a general verdict at all. They even controvert the proposition, if we understand them correctly, that it was our duty to indulge in any presumptions in favor of the general verdict, a matter we shall notice more particularly hereafter. In connection with the counsel's insistence that the appellee was in duty bound to wait till the west bound train had passed beyond

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the point at which it obstructed the view of the train that struck appellee, counsel think we gave too much weight to the fact that the safety gate stood open, and insist that we are in irreconcilable conflict with the case of *Smith v. Wabash R. R. Co.*, 141 Ind. 92. Counsel say: "In that case, the traveler knew a flagman guarded the crossing; he was accustomed to depend upon his signals; he did not know that the flagman went off duty at 6:30 p. m., and when he approached between 6:30 and 7 p. m. he looked for the flagman, and not seeing him believed his nonappearance indicated that he was in his flaghouse and therefore no train was then approaching. Upon this assumption he went on, relying upon the fact that the flagman did not warn him, as an invitation to cross. Yet the Supreme Court, even in that case, held that the plaintiff's duty of care was the same as it would have been had the crossing never been guarded by a flagman, and that his driving on, without looking out for himself, was negligence *per se*, to be passed upon as such by the court."

One of the material features by which the case cited must be distinguished from the case in appeal, is that in the former there was a special verdict, while in the latter there was not. As the court there very properly say: "Unless all the facts essential to a recovery by appellant are found in the special verdict, there was no error in rendering judgment thereon in favor of appellee." The learned counsel will hardly contend that the circumstances and conditions of the place of the injury were shown to be alike, or even similar in the two cases. In the case relied upon, the crossing was on Main street, in the city of Danville, Illinois, "the principal thoroughfare east and west through said city." The plaintiff in that case sought to excuse himself from looking and listening in the direction from

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which the train was approaching, and of which a clear view could have been had by him if he had looked, and the train heard, had he listened, the track being unobstructed for some distance, by the fact that the safety gate was open and the flagman was not there, treating the open gate as an invitation to cross, upon which he had a right to rely. The court said: "The appellant did not look or listen after the first time, when he was 100 feet from the crossing. He had an unobstructed view to the north, could have seen if he had looked, and could have heard if he had listened. The surroundings were such as to admit of his looking and listening. He neglected these precautions, and, by reason thereof was injured," etc.

In the case at bar, we have no such conditions as these. Indeed, it may be truthfully said that the very opposite was true, as appears even from the answers to interrogatories, without resorting to the indulgence of any presumptions on account of the general verdict. Here "the surroundings were" not "such as to admit of his looking and listening," but it is expressly found by the answers to the interrogatories that the confusion of noises was such as to render it impossible for him to hear. Looking could not avail him because the west bound train was in the way, although the jury found they did not know why he could not see, and that the train was not in *plain* sight. But they also found that the appellee did look, in both directions, after he had started across the track. It would require an extraordinary process of reasoning to lead the ordinary mind to the conclusion that the conditions were shown to be practically similar in both cases. It must be remembered, too, that in the present case there was a large number of tracks upon all of which engines and trains were almost constantly passing, and it is impossible to lay down any rule

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which would require a pedestrian, in such circumstances, to wait during any certain period of time after the passing of a train before undertaking to cross the track, otherwise he might never be able to pass over it at all. From anything that appears in the answers to interrogatories, as stated in our former opinion, other cars or engines might have been approaching from the opposite direction or from the same direction of the train that struck appellee, which would have made it exceedingly hazardous for him to remain longer at or near the place from which he started to cross the track. So long as the company maintains its crossing at grade with the public streets the footman certainly has some right to expect that it will adopt special precautionary measures to prevent injury from passing trains. Under these circumstances we think the jury was justified in taking into consideration the fact that the safety gate stood open and that no danger signals were given. There is no conflict between the case relied upon and the case at bar in respect of the question just considered.

The next contention of the appellant's learned counsel is introduced by them, in their brief, as follows: "The court has announced in the case in appeal that a general verdict for plaintiff raises a presumption that it was proved that the plaintiff was, at the time of injury, not guilty of contributory negligence and that the defendant, upon appeal, if he would overcome the effect of the general verdict, must make it appear that the plaintiff was guilty of contributory negligence, or the verdict will stand. If this is the law, the case of *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280, was not properly decided. In that case, there was a general verdict. The defendant (appellant) did not attack that verdict with evidence or facts found, showing, or even tending to show that the plaintiff was guilty of

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contributory negligence. It went to the Supreme Court merely with the proposition that the plaintiff had been allowed to go to the jury without proof as to what care she was exercising or what she was at the time doing, and therefore the jury could not say upon the proofs whether or not the plaintiff was negligent. * * * The Supreme Court did not find that this verdict, which had been 'approved by the trial court' raised any countervailing presumption in plaintiff's favor, but merely applied the rule that the evidence did not warrant the jury in holding that the plaintiff was exercising due care, and, even at that stage of the case, after verdict and approval of it by the trial court, reversed the case upon the strength of the presumption of negligence in the plaintiff."

With all respect for the ability and standing of the learned counsel, we cannot refrain from expressing our surprise at this attempt to establish an analogy between a case where the error relied upon is the overruling of a motion for a new trial, owing to the insufficiency of the evidence to sustain the verdict, and one in which the evidence is not in the record, and answers to interrogatories are relied upon to overthrow the general verdict. We are in full accord with the doctrine invoked by counsel that one who is injured at a railroad crossing by a passing train is *prima facie* guilty of contributory negligence, and must adduce some testimony to establish his freedom therefrom before he can recover damages for the negligence of the railroad company. In our original opinion we expressly stated this to be the rule, but said that this presumption no longer prevailed after the general verdict and its approval by the judgment of the trial court. It is as to the latter part of this proposition that appellant's counsel take issue with us and assert that it is in conflict with the ruling of the Supreme

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Court in the case of *Cincinnati, etc., R.W. Co. v. Howard, supra*. That we were correct in our view as to the rule stated we entertain not a shadow of doubt. What we said on that subject was of course with special reference to a case like the present one, in which the evidence is not to be looked to in the solution of the question before us. But even if the question involved should arise on the sufficiency of the evidence, it cannot be successfully maintained that the burden of showing its sufficiency is upon the appellee, otherwise there would be no necessity of the appellant's bringing before this court the record of the evidence at all, and that task would devolve upon the appellee. All the appellant would be required to do would be to assert that the evidence was insufficient to establish the plaintiff's freedom from fault and throw the burden on the appellee to establish due care, precisely as he is required to do in the trial court. It seems to us that it requires no argument to establish the fallacy of such a proposition. Every lawyer who has had experience in appellate practice knows that error is never presumed upon any ground, but that the presumption is always in favor of the correctness of the judgment of the *nisi prius* court, until the appellant has succeeded in showing by the record wherein the court has erred. We grant that in the determination of the errors relied upon, the appellate tribunal may and must, in proper instances, invoke the rules of law governing the lower court. Thus, if the error relied upon is the insufficiency of the evidence upon any given point, and it appears affirmatively that all the evidence is in the record, the Appellate Court must determine whether there was enough evidence before the trial court or jury upon the point in dispute to authorize them to make the finding that was made. In determining that proposition, the appellate tribunal

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will, of course, apply the rule that there is in the outset a presumption that the plaintiff was negligent, and it will determine whether the lower court correctly held that there was sufficient evidence to overcome such presumption. In other words, the appellant overcomes the presumption that there is no error by showing by the record of all the evidence adduced below that such evidence was insufficient; or, to be more accurate, that, upon the question involved, there was no evidence which warranted the jury or court to find as it did. In practice, as a matter of course, this court, or the Supreme Court, does not find it necessary generally to draw the distinction in the method of applying the rule as to presumptions between the Appellate Court and the trial court. Thus, in the case of *Cincinnati, etc., R.W. Co. v. Howard, supra*, with which it is contended we are in conflict, it was not necessary for the Supreme Court to declare that in considering the sufficiency of the evidence it would first indulge the presumption that everything done by the lower court was regular, that the judgment was right, that every ruling of the trial court was proper, that the evidence upon every point necessary to make out a case was sufficient. And yet this is precisely the rule upon which that court acted, and always acts in such cases, notwithstanding the fact that it does not in every case reiterate the rule. There are some things, even in the decisions of cases on appeal, which must be taken for granted, and when a principle of practice has become so universally accepted as the one in consideration, courts will not feel called upon to announce it every time even though no question has been raised concerning it. In the case cited, the appellant had the burden of showing the insufficiency of the evidence in the particular respect in which it was claimed

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to be insufficient. To remove this burden the appellant was required to properly bring the evidence before the court, to show that it was *all* the evidence given, to discuss the point in the brief, and to do everything which the law prescribes should be done to accomplish that object. It is then, and not till then, that the court will examine the record and apply the rules of presumption applicable in the court below. And even then it will, as a general rule, only look for such defects in the evidence as are pointed out in the brief and supported by the record, the presumption of regularity adhering throughout until the assertion of the contrary has been made good by the record.

In the Howard case, it is literally true, as appellant's counsel assert, that "the Supreme Court did not find that the verdict which had been 'approved by the trial court,' raised any countervailing presumption in plaintiff's favor;" but that principle was unquestionably given its full application, notwithstanding the silence of the court upon the subject. It was not necessary for the court to declare that the points were properly raised in appellant's brief, that the bill of exceptions was presented to the judge and filed within the proper time, duly certified by the judge, that the transcript was properly certified by the clerk, and duly filed in this court; that it was duly shown that *all* the evidence given in the trial court was brought into the bill of exceptions, etc., etc. The court tacitly found that all the steps necessary to overcome the presumption referred to had been taken. Having found this impliedly the court proceeded to examine the evidence in the record, and finding it insufficient, declared it to be so, and, in connection therewith, enunciated the rules which the trial court should have applied, and which, if it had applied,

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must have led that court to sustain the motion for a new trial.

To hold that there is no presumption in favor of the verdict and judgment of the trial court, on appeal to this or the Supreme Court, would be to entirely change the character of the proceedings obtaining here, as well as the character of the court itself. Unless such a presumption is indulged, the appeal is governed by the same rules as those prevailing in appeals from a justice of the peace to the circuit court, where the case on appeal is tried *de novo*. There the judgment and its incidents have no presumptive force whatever, and the cause is tried the same as if no trial had ever been had and no judgment had ever been rendered. Not so, however, with appeals from the circuit to this or the Supreme Court. Here no causes are tried *de novo*. The record is brought here only for review and to determine whether the trial court committed any legal error in its rulings, and not for trial. Whatever may be the mode and nature of appeal, whether the case is brought here on reserved questions of law, or to review the evidence, the presumption of the regularity of the judgment, and every ruling behind it or incident to it, stands as a bulwark for the protection of the appellee, until overthrown by the recitals of the record to the contrary. Says Judge Elliott: "The rule that all reasonable presumptions and intentions will be made in favor of the rulings of the trial court is one of the best settled and most frequently applied rules in appellate procedure. The rule rests on a firm foundation. It is supported by the elementary principle that official acts are presumed to be rightfully performed. But when it is brought to mind that a court acts impartially, upon full information and with a calm deliberation, the foundation of

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the rule stated will at once be perceived to be broader and stronger than that which underlies the rule supporting the acts of ministerial or executive officers." Elliott's Appellate Procedure, section 711.

The presumption is, of course, not conclusive, and may always be rebutted. But it is "of such strength as to cast upon the party who assails the rulings of the trial court the burden of making it clearly appear that the rulings were wrong." *Id.*, section 710.

"It will be assumed on appeal, in cases where the record is silent, that the preliminary steps necessary to impart vitality and force to a judgment were duly taken." *Id.*, section 718.

And "it will be presumed," says the same author, "that jurors have rightfully performed their duty and have returned a true verdict according to the law and the evidence. The general doctrine is declared and enforced in the many scores of cases which hold that it will be assumed that the verdict is supported by the evidence and that the jury properly decided the controversy in cases where the evidence is conflicting. * * * In short, all reasonable intendments will be made in order to support the verdict where the record contains nothing sufficient to justify its overthrow, and this doctrine is nothing more than a reasonable application of the general rule that a breach of sworn duty must be clearly shown." *Id.*, section 724.

But if this rule is so universally applicable in cases where the evidence is in the record, and the judgment is assailed because of the insufficiency of such evidence, how much greater reason is there for giving it force where the evidence is absent and the only thing relied upon to overthrow the general verdict is the finding of the jury in answer to interrogatories submitted to them. So often has the rule been reiterated

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that, in order to override the general verdict, the answers to interrogatories must be absolutely repugnant to and in irreconcilable conflict with the former, and that such antagonism must appear on the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues, that we had supposed it was no longer a subject for legitimate controversy. But to deny the duty of this court to indulge the presumption to which we have alluded, or make the intendment in favor of the general verdict, is asking it to strike down the rule just referred to, and treat the answers to the interrogatories as a special verdict, thus ignoring the existence of the general verdict absolutely. That the court will not presume anything in favor of the special findings of a jury as against a general verdict, but will make every reasonable presumption in favor of the general verdict, as against the answers to the interrogatories, see: *McCallister v. Mount*, 73 Ind. 559; *Cook v. Howe*, 77 Ind. 442; *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Lassiter v. Jackman*, 88 Ind. 118; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Sanders v. Weelburg*, 107 Ind. 266; *Redelsheimer v. Miller*, 107 Ind. 485; *McComas v. Haas*, 107 Ind. 512; *Ft. Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100; *Rice v. Manford*, 110 Ind. 596; *City of Greenfield v. State, ex rel.*, 113 Ind. 597; *New York, etc., R. W. Co. v. Grand Rapids, etc., R. R. Co.*, 116 Ind. 60; *Chicago, etc., R. W. Co. v. Hedges*, 118 Ind. 5; *Smith v. Heller*, 119 Ind. 212; *Louisville, etc., R. W. Co. v. Creek*, 130 Ind. 139; *British American Assurance Co. v. Wilson*, 132 Ind. 278; *Evansville, etc., R. R. Co. v. Gilmore*, 1 Ind. App. 468; *Black v. Haseltine*, 3 Ind. App. 491; *Vance v. City of Franklin*, 4 Ind. App. 515; *Chicago, etc., R. R. Co. v. Brannegan*, 5 Ind. App. 540; *Cleveland, etc., R. W.*

Co. v. Johnson, 7 Ind. App. 441; *Rittenhause v. Knoop*, 9 Ind. App. 126; *Lake Erie, etc., R. R. Co. v. McHenry*, 10 Ind. App. 525; *Indianapolis Union R. W. Co. v. Ott*, 11 Ind. App. 564; *City of Fort Wayne v. Farnan*, 13 Ind. App. 536; *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588.

And so we think it indisputably true, under our practice, that the general verdict will be aided by every reasonable intendment, while the contrary is true as to the answers to interrogatories. Hence we are still of opinion that there is a presumption in favor of the correctness of the general verdict, and that there is nothing in the case of *Cincinnati, etc., R. W. Co. v. Howard*, *supra*, nor in the case of *Smith v. Wabash R. R. Co.*, *supra*, with which our ruling comes in conflict. We do not for a moment question the doctrine enunciated in those cases, that the burden is upon the injured party to overcome the presumption of negligence on his part, but we say that he has overcome that presumption by the verdict of the jury, approved by the judgment of the trial court, and having done that, it now devolves upon the appellant to show by the recitals of the record that such verdict was wrong.

It is also complained that we have "misconceived the effect of the findings of the jury as to Neubacher's knowledge that the gates were not being used." We have not attached, and do not now attach much importance to the position of the gate pole, except that it was a circumstance which the jury had a right to consider. Counsel will agree with us, we think, that as a general rule the open gate is an invitation for parties to cross, but we did not hold in our former opinion that it would be so under all circumstances, and that the appellee need not otherwise make use of his faculties if he saw the gate open. If he could see and hear the train, he was bound to do that, and could

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not depend upon the open gate, and the failure to put out danger signals. But it was a question for the jury to determine whether, under the peculiar circumstances of this case, he had a right to place any reliance upon the open gates and the absence of danger signals, and the fact that the appellee knew the gate was not put down while another train had passed that crossing, would not of itself abridge or abrogate the right of the jury to so decide when they considered that circumstance with all others before them. Appellee knew that the gate was not closed while the train passed going west, but he did not know, and could not have known what happened that evening in connection with the gate before he arrived there. At least there is no finding that he did know that the gate was not operated. We do not know what other facts and circumstances the jury had before them by which they arrived at the conclusion that appellee exercised due and proper care. The appellant's counsel admit that the jury found that although appellee had frequently passed there before, he did not know whether the gates were closed or a flagman was employed at night or not. If he did not know, and saw no danger signals, but saw the open gate, and otherwise used such precautions as a man of ordinary prudence having regard for his personal safety would use, as the jury necessarily found by their general verdict, we are not at liberty to say that such finding was unwarranted in view of the answers to interrogatories.

It is urged, however, that we have in effect overruled or refused to follow the recent case of *Oleson v. Lake Shore, etc., R. W. Co.*, 143 Ind. 405.

As we have not the slightest inclination to come in conflict with the rulings of the Supreme Court, and as we understand our duty to be to follow instead of overruling its decisions, we have made a careful ex-

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amination of the case referred to in order to ascertain whether some new principle of law had been there enunciated which had escaped our attention in the original decision. The opinion of Monks, J., in that case, contains an able and accurate presentation of the legal rules applicable to the facts established by the evidence, and after a careful examination of that opinion we are unable to find in it anything in conflict with our views of the law as declared in the original opinion in the present case. In the case referred to, the facts were undisputed and, as the court expressly found, but one inference could be drawn from them, which inference was, of course, for the court and not for the jury to draw. The trial court, after the plaintiff had concluded his evidence, directed a verdict for the defendant, and the Supreme Court held that this was proper. The plaintiff's injury in that case, as in the present, occurred at a grade crossing by being struck by a moving train as he attempted to pass over such crossing on the highway. The station at or near the crossing was a small one, and the roadbed contained but two main tracks. The railroad ran east and west and the highway north and south. There was another highway which ran east from the first named, immediately south and adjoining the right of way of the railroad. The north track was for east bound trains and the south track for west bound trains. Trains frequently passed each other at the crossing. All of this he knew, as he lived near the railroad. The plaintiff was going west on the east and west highway, driving a horse attached to a light wagon, sitting sideways on a board between the wheels of the wagon, with his face to the south. As he turned north upon the highway which crossed the track north and south, he faced to the north, and looked both ways, east and west, when he saw a

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freight train about 400 feet west on the crossing and west of the depot coming from the west and going east on the north track. He stopped about forty feet from the south track and waited till this train going east had passed. He looked to the east, but saw no train. He could not see over a half mile to distinguish objects, the day being somewhat dark and cloudy, the wind blowing from the northeast. The smoke from the engine of the eastbound train obscured the view to the east after the engine passed the crossing. This freight train contained 30 cars and was about 900 feet long. After the last car had passed the crossing about two or three rail lengths, the plaintiff started his horse and drove upon the crossing. Just before he started his horse, he looked east and west and listened, but could see but a short distance east on account of the smoke. When he started his horse the smoke was clearing away and he could see about 100 feet to the east. As his horse stepped upon the track the plaintiff, who was still looking to the east, saw an engine and train of cars about 100 feet away approaching him from the east on the south track at the rate of from ten to fifteen miles per hour. He whipped the horse with the lines and endeavored to pass in front of the engine, but the rear wheel of the wagon was struck and plaintiff was injured. The whistle on the engine was not sounded, nor was the bell rung. From the point where plaintiff had stopped his horse he could see, except for the smoke, a distance of about a half mile eastward along the south track. There were no intervening obstacles, other than the smoke.

From these facts, to which the plaintiff alone had testified, the court below concluded there was no right of action shown, the plaintiff being guilty of contributory negligence. This view was shared by the Supreme Court and the judgment affirmed.

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The court reiterated the general rule so often before declared as to what constitutes "ordinary care under all the circumstances," on the part of a traveler who undertakes to pass over a crossing at grade. He must look and listen for signals and approaching trains, and use all his faculties to avoid danger. The greater the danger the more vigilance he is required to use. If by listening or looking he could have avoided the danger, and failed to do so, he was at fault and cannot recover. If he did look and listen, and did not heed what he saw or heard, he was guilty of negligence. The court then proceeded to demonstrate that the plaintiff and appellant in that case did not make proper use of his faculties, or rather that he did not properly heed that which he had perceived by the use of them. In this connection we quote from the learned judge's opinion:

"It is clear from the appellant's testimony, that when he came to a stop forty feet south of the south main track the east bound train was about opposite the depot, which was two hundred and fifty feet west of the crossing. This train was about nine hundred feet long, and going east on north main track, at about the rate of fifteen miles per hour. When the caboose of the east bound train had passed two or three rail lengths east of the crossing, appellant saw the engine of the west bound train [the train by which he was struck] one hundred feet east of the crossing. This train was going at about the rate of fourteen or fifteen miles per hour, about the same rate per hour as the east bound train. It is clear that from the time the east bound train was two hundred and fifty feet west of the crossing until it reached the crossing the west bound train on the south main track was within one-half mile of the crossing and in plain view thereof. During all this time, and until the engine draw-

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ing the east bound train passed onto the crossing, there was no smoke to obscure appellant's view east on the south main track, *and if he had looked in that direction any time between the time he stopped forty feet south of the track and the time the engine of the east bound train passed onto the crossing, he would have seen the train on the south main track approaching from the east. He had an unobstructed view to the east, and he either did not look in that direction, or if he looked did not heed what he saw.* It would be no excuse that immediately afterward the smoke obscured his view of the approaching train, so that he could not see its approach. *He knew it was approaching and went upon the track at his peril. Such conduct, under the authorities cited, is negligence per se.*"

There is here not a word said, it will be observed, as to the duty of the injured person to wait until the train going east had passed a sufficient distance to enable him to see whether another train was then approaching from the east. The plaintiff and appellant in that case was held guilty of contributory negligence, not because he failed to wait until the obstruction of his view, caused by the east bound train was removed, but because he entered upon the track after he could have seen, and in fact had seen the train approaching from the east at a rate of speed of from ten to fifteen miles per hour, and by endeavoring to pass in front of the engine knowingly exposed himself to the danger of the collision which followed. We have italicized that portion of the quotation we made from the case relied upon as declaring the law differently from the way we stated it in our original opinion in this case, which we think clearly shows the ground upon which the Supreme Court base their opinion, and it does seem to us that the merest tyro in

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the law will be able to distinguish the two cases at a glance. In the case before us for final determination it is not claimed that the appellee could have seen, and did see the train that struck him approaching the crossing for a distance of one-half mile, 100 feet, or any distance whatever, or that he could have seen it, had he looked and listened. The only claim here made is that if he had waited until the west bound train had passed a sufficient distance, he might have seen the train by which he was run down advancing toward the crossing. How the ruling of the Supreme Court in the case from which we have quoted can be said to be in conflict with our holding on the question of contributory negligence is therefore not easy for us to perceive.

In the case referred to, the court proceed to say that even if the smoke from the east going engine had obstructed the view east of the crossing for some distance, he knew that this was but a momentary obstruction, which the wind would presently clear away, and that he would then be enabled to have a clear view east on the south track for one-half mile. He knew that a train could and did run west on the south track, while trains were going east on the other. The railroad company had done nothing to mislead him or throw him off his guard. Under these circumstances the court declare that it was his duty to wait until he could see and hear and ascertain with reasonable certainty that it was safe to cross.

It will be observed that these facts are only assumed and the rule applied which would govern if they had been true. The actual facts showed, as we have said, that the plaintiff could have seen the train approaching half a mile away, and did see it when he entered upon the track, 100 feet distant. But even the supposed facts do not coincide with those in the

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present case. Here, as has been shown, trains and engines were constantly passing, and instead of a double track we have a large number of them. The crossing was upon one of the principal streets of a populous city, at grade, where pedestrians had a right to cross and recross and must do so in order to use the street. We do not say that under such circumstances the traveler over the tracks was not bound to use the highest degree of vigilance consistent with the surroundings. But while this was the duty of appellee, a like degree of care devolved upon the appellant, and the appellee had a right to assume that this was being done. He could not be required to wait for an indefinite length of time and see that no train or engine was approaching from either side before he could legitimately undertake to cross. The crossing was a public highway and pedestrians had a right to its use, as well as the railroad company. We do not declare as a matter of law that the appellee was or was not guilty of negligence under the facts, for we have not all the facts before us. What we do hold is that it was a question for the jury to determine from the evidence as to whether the appellee exercised such care as the law required at his hands. In the case relied upon the evidence was in the record, and the court could well determine from it whether the plaintiff was or was not at fault. In the case at bar, the evidence is not in the record, and we would not be permitted to look to it if it were, and the answers to interrogatories are not antagonistic to the presumption of due care which the general verdict carries with it. Granting that some of the facts proved and assumed in the Oleson case were like some of the facts in the case at bar, it does not follow that the latter must turn upon the same facts upon which the Oleson case turned. Because, in the Oleson case there was a volume of

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smoke made by the passing train which rendered it dangerous for the plaintiff to pass before it had cleared away, we are not required to hold that in the present case the appellee was also bound to wait till the smoke had disappeared. Otherwise the appellee might be required to wait forever before attempting to enter upon the highway at this crossing. There is no law that requires him to do this.

Appellant's learned counsel also find fault with our construction of the case of *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. Counsel say that this case was not one involving the rights and duties of a traveler upon a highway at a railroad crossing at all, and in support of this assertion state that the plaintiff had been a passenger of the defendant railroad company, "and had been discharged from its train at a point substantially upon a highway or street." Our only purpose in citing this case, as may be plainly seen from the reading of our former opinion, was to show that it is not conclusive proof of negligence on the part of the plaintiff that he passed over the crossing at a time when his view of the track was obstructed by a passing train. Notwithstanding the fact that in the case cited the plaintiff was or had been a passenger on the defendant's railroad, when she undertook to cross the track at the highway crossing, she was bound to exercise that "due and ordinary care" which pedestrians are required to exercise when about to pass over such a crossing. The fact that one has been a passenger, and is still entitled to the protection as such, while in the act of leaving a train and a railway station, does not absolve him from the duty of exercising proper care at a crossing over which he is required to pass in his route from the train, nor is the opinion based upon any theory to the contrary.

In the case cited the court did not undertake to de-

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fine the exact degree of care that must be used by the discharged passenger, as distinguished from that to be exercised by other pedestrians. The court in that case simply ruled that it was a question for the jury to decide, whether due care had been exercised. "If she went upon the track," says the opinion of the court, "where another train was to be expected at any time, when she was unable to see whether it was approaching or not, or without looking to see if the way was clear of danger, she did not use that reasonable precaution which every one is bound to exercise for his own protection in such places. We are unable to see how the accident could have happened without some want of proper care on her part. The inference from the result is very strong. But its force is applicable only in disproof of whatever testimony there may be tending to show the exercise of care. *It presents only the question of preponderance; and however decided that preponderance, it does not transfer the determination of the issue from the jury to the court.*" (The italics are our own.) This supports our holding fully. Indeed, the case at bar is a stronger case for the appellee than the case cited, for in the Massachusetts case the facts were all before the court, while here the evidence is absent. Neither case, however, is one in which the court is permitted to say as matter of law that the conduct of the plaintiff showed contributory negligence. To use another quotation from the opinion in the Mayo case: "We do not perceive, therefore, in the mere fact that she started to cross the railroad track so soon after the train by which she came had left the station, such clear and inexcusable want of care as to justify the court in withdrawing the case from the jury." This is precisely our view as to the case at bar. We cannot say, in the absence of the evidence, whether the appellee was or

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was not chargeable with contributory negligence in starting over the track so soon after the west bound train had passed the point opposite that where appellee stood. It was a question for the jury, and, although there are findings indicating carelessness on his part, they are not so clear and conclusive as to overcome the presumptions in favor of the general verdict. Nor do we think a different rule is announced in *Fletcher v. Pittsburg, etc., R. R. Co.*, 149 Mass. 127. The ruling in the case just cited in no wise conflicts with that in the Mayo case. The Fletcher case was reversed upon the evidence. There a driver of a four horse team undertook to drive across a railroad track at a grade crossing immediately after a freight train had passed. He knew there was no gate or flagman there and that a passenger train was due at about that time each day, and was familiar with the crossing. Under these circumstances he was held guilty of contributory negligence. The facts in the Fletcher case were similar to those in *Marty v. Chicago, etc., R. W. Co.*, 38 Minn. 108, which the appellant's counsel think is also in conflict with our holding. A very cursory examination will serve to disclose the difference in these cases.

Other cases cited by us, it is insisted by counsel for appellant, do not support the views we expressed in the former opinion. We have again examined those cases, and are still of opinion that they bear the construction we have placed upon them. Nothing has been said in the very elaborate brief of appellant's counsel which leads us to any different conclusion than the one at which we arrived in our original opinion.

Petition overruled.

Everroad, Admr., v. Lewis et al.

EVERROAD, ADMINISTRATOR, v. LEWIS ET AL.

[No. 1,982. Filed May 8, 1896. Rehearing denied September 24, 1896.]

EXECUTORS AND ADMINISTRATORS.—*Action to Compel Payment of Claim.—Change of Venue.*—An action to compel an administrator to pay a claim allowed against the estate, the amount of which by his final report he attempts to retain in payment for services rendered to the claimant, is not a civil action within the meaning of section 416, Burns' R. S. 1894, providing for a change of venue of certain civil actions.

From the Jefferson Circuit Court. *Affirmed.*

Vanosdol & Francisco and *G. B. Everroad*, for appellant.

J. W. Linck and *S. E. Leland*, for appellees.

ROSS, J.—The appellees, Hattie L. Lewis and Hattie L. Lewis, guardian of Sallie G. Lewis, filed separate petitions in the court below to compel the appellant, George B. Everroad, administrator of the estate of James R. Lewis, deceased, to pay certain claims allowed in their favor against said estate, it appearing that the estate had been pending more than two years and was solvent. The two petitions or proceedings were consolidated and tried as one. As to each petition the appellant filed a motion and affidavit for a change of venue from the county which were overruled by the court. The sufficiency of the affidavits is not disputed, the only question being whether or not the proceedings were such as entitled the parties to a change of venue at all.

Section 416, Burns' R. S. 1894 (412, R. S. 1881), provides that "the court in term, or the judge thereof in vacation, shall change the venue of any civil action

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upon the application of either party," making affidavit showing any one of the causes enumerated in said section.

But the question that confronts us is this: Is this a civil action within the meaning of the statute? It has been held that a change of venue is proper in a claim against a decedent's estate, *Lester v. Lester, Exr.*, 70 Ind. 201, and in an application for the sale of lands belonging to a decedent's estate. *Scherer v. Ingerman, Admr.*, 110 Ind. 428. There is no doubt but what the cases cited are embraced within the term "civil action." In the case before us there was no question as to the correctness of the claims of the appellees, for the claims had already been allowed, the only question was whether or not the administrator had a right to settle the estate without paying them. The record discloses that the appellant was employed by the appellees as their attorney to defend their interests in an action brought by one Mary J. Wadsworth, against them, in which the title to certain real estate was involved, and that as such administrator he retained and in his final report accounted as holding for his services as such attorney, the amount due the appellees from said estate. To his report the appellees filed exceptions.

An administrator is in a sense an officer of the court, and at all times subject to the court's orders, hence the right of the court to make orders with reference to many things pertaining to the conduct of an administrator in the settlement of an estate, are purely discretionary. Of that nature was the question presented by the petitions of the appellees to require the appellant to pay their claims out of the funds in his hands before closing the estate. In such cases a change of venue is not a matter of right. As

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bearing upon the question here involved see *McClelland, Admr., v. Bristow, Admr.*, 9 Ind. App. 543.

The judgment of the court below is in all things affirmed.

LOFLAND v. GOBEN.

[No. 1,951. Filed June 16, 1896. Rehearing denied Sept. 25, 1896.]

INSTRUCTIONS.—*Will be Considered as a Whole.*—Where the instructions as a whole state the law correctly, it is not reversible error that some particular instruction or part of an instruction is incomplete or inaccurate.

NEGOTIABLE INSTRUMENTS.—*Note Given for Patent Right.*—A note given in consideration of a conveyance of a patent right, which does not contain the words "given for a patent right," or words of like import, is invalid in the hands of one who accepts it with full knowledge of the consideration for which it was given.

APPEAL AND ERROR.—*Instruction.*—A judgment will not be reversed for refusal of a correct instruction, unless the record affirmatively shows that such instruction was tendered to the court before the argument was commenced as provided by section 542, Burns' R. S. 1894 (533, R. S. 1881).

SAME.—*Instructions.*—*Presumption.*—It will be presumed on appeal that instructions tendered and refused, were refused because they were not tendered in time, where the record does not affirmatively show that they were tendered before the argument was commenced.

From the Montgomery Circuit Court. *Affirmed.*

O. U. Perrin and Kennedy & Kennedy, for appellant.

G. W. Paul and H. D. Van Cleave, for appellee.

Ross, J.—The appellee brought this action against the appellant upon two promissory notes. Upon issues formed the cause was tried before a jury, resulting in a verdict in favor of appellee upon which judgment was rendered.

The only specification of error assigned in this

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court is, "The court erred in overruling the motion for a new trial."

Complaint is made of several of the instructions given by the court. These instructions, in the main, state the law correctly. In considering the correctness or incorrectness of certain instructions given, it is necessary to consider all of the instructions given, and if when all are considered together they state the law correctly, it is not error if some particular instruction or part of an instruction is incomplete or inaccurate. The appellant attacks and seeks to overthrow separate instructions or parts thereof without considering them with reference to the other instructions given. That is not the rule by which the sufficiency of an instruction is tested. *Patchell v. Jaqua*, 6 Ind. App. 70; *Beugnot v. State, ex rel.* 11 Ind. App. 620; *Evansville, etc., R. R. Co. v. Talbot*, 131 Ind. 221; *Deilks v. State*, 141 Ind. 23.

It is next urged that the court erred in refusing to give the following instruction tendered by the appellant, viz.: "If you believe from the evidence that the sole and only consideration for the notes in suit was the sale and conveyance of a patent right and that the notes did not contain the words, 'given for a patent right,' or words of like import, and that plaintiff accepted said notes with full knowledge that they had been given for a patent right, then this plaintiff can not recover on them and your verdict should be for defendant." This instruction, so far as we have been able to discover, states the law correctly, was applicable to the evidence introduced to sustain the issues and was not covered by any other instruction or instructions given. The evidence was conflicting as to whether or not the notes sued on were given for an interest in a patent right and that was one of the issues being tried, hence the appellant was entitled to

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have the jury instructed upon that question. But counsel for the appellee insist that the appellant can not have a reversal for the refusal to give this instruction because the record does not show that it was tendered to the court after the close of the evidence and before the commencement of the argument to the jury. The statute, clause 4, section 542, Burns' R. S. 1894 (533, R. S. 1881), provides that "when the evidence is concluded, and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court."

Unless the record affirmatively shows that the instructions tendered and refused were tendered to the court before the argument was commenced it will be assumed that the court refused such instructions because not tendered in time. *Kackley v. Evansville, etc., R. R. Co.*, 7 Ind. App. 169; *Puett v. Beard*, 86 Ind. 104; *Hege v. Newsom*, 96 Ind. 426; *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664; *Citizens' Street R. R. Co. v. Hobbs*, 15 Ind. App. 610.

The presumptions that arise in favor of the correctness of the rulings of the trial court impose upon one asking a reversal to present a record which affirmatively rebuts such presumptions. No such showing is presented by the record before us.

The judgment is affirmed.

ON PETITION FOR REHEARING.

Ross, J.—The appellant asks a rehearing, insisting that the original opinion is wrong in holding that "unless the record affirmatively shows that the instructions tendered and refused were tendered to the court before the argument was commenced, it will be as-

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sumed that the court refused such instructions because not tendered in time." In support of their contention, counsel say "when the record shows that an instruction was written; that it correctly stated the law; that it was not covered by any other instruction given by the court; that it related to the issues in the case; that it was applicable to the evidence; that it was signed by the party asking it, and that it was presented to the court and asked to be given to the jury, why should it be presumed that the trial court refused to give it because it was not presented just after the evidence closed and just before the argument began?"

Were it not that we feel convinced that counsel are not familiar with the rules governing the decision of cases in this court we would be disposed to say nothing further from what is said in the original opinion in support of this proposition, but believing the petition to have been filed in good faith and not merely for delay, we will state why the presumption above stated prevails. By a long line of adjudications, from which there has been no deviation, it has been held that on appeal to the Appellate Court a presumption arises and is indulged that the judgment and proceedings of the trial court are right and that such judgment will not be disturbed unless the record shows affirmatively that an error has been committed, and that the judgment is wrong. When the trial court makes a ruling against a party, it is the duty of such party, if he desires to have the ruling reviewed, to see that the record recites fully and accurately the facts. He is the one who complains of the court's ruling, and upon him rests the burden of showing that such ruling was wrong. The opposite party has nothing to complain of, for the ruling is in his favor, hence no duty rests upon him to see that the record should

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show the ruling to be right. If the duty rested upon the successful party to show that the judgment and proceedings were right and not upon the complaining party to show that they were wrong, counsel's contention must prevail. That, however, is not the rule in this State.

Elliott, J., in *Puett v. Beard*, 86 Ind. 104, says: "One complaining of a ruling must, in order to secure a reversal, affirmatively show that he placed himself in an attitude to rightfully ask that which the court refused him. If this is not done the presumption of regularity, which always attends the proceedings of the trial court in the absence of a contrary showing, will require the appellate court to assume that the party did not do that which the law required him to do, in order to entitle him to the ruling asked."

The record in this case does not show when the instruction refused was tendered, hence there is nothing from which this court can say that the appellant was entitled to have the instruction given. The trial court was not bound to give the instruction unless it was tendered before the argument was commenced, hence the duty rested upon the appellant to have the record show that it was tendered in time.

We deem it unnecessary to add anything to what has already been said relative to the rules applicable to the consideration of instructions given. We think of no reason why the rule should be changed and counsel suggest none.

Petition overruled.

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LEAVELL ET AL. v. STATE, EX REL. MARSH.

[No. 1,150. Filed September 29, 1896.]

PLEADING.—*Action on Official Bond.*—*Complaint.*—A complaint in an action under Act of June 5, 1883, to recover from the clerk of the court and the sureties on his official bond the amount paid by the State, as fees and charges, to the Attorney-General, need not expressly aver that the money was withheld by the clerk for twelve months before its collection by the Attorney-General, as such fact will be presumed. *p. 76.*

ACTION.—*Official Bond.*—*Statutes Construed.*—The Act of March 5, 1889 (7692, Burns' R. S. 1894), providing that payment to or collection by the Attorney-General of any funds which county or State officers shall refuse to pay over to the proper custodian, shall not render such officers liable to an action on their bonds by any other officer or person, is limited to liability for the funds so paid over, and does not repeal Act of June 5, 1883, providing for the recovery by the State from such officers and sureties, the amount paid as fees to the Attorney-General. *pp. 77, 78.*

VENUE.—*Application for Change of, Made After Time Fixed by Rule of Trial Court.*—It is not error for the trial court to refuse a change of venue on the ground of local prejudice when the application is made after the time fixed by a rule of the court requiring the application in civil causes returnable on or after the fourth day of the term, and providing that applications subsequently made will not be entertained. *pp. 79-83.*

SAME.—*Application for Change of Venue Made by One of Several Co-parties.*—A defendant cannot complain of the denial of the application for a change of venue on the ground of local prejudice, made by a co-defendant alone, although the affidavit states that the latter makes the motion for all the defendants. *p. 81.*

NEW TRIAL.—*Joint Motion For.*—A joint motion by several co-parties for a new trial must be well taken as to all the parties joining in it or there will be no error in overruling it. *p. 83.*

From the Randolph Circuit Court. *Affirmed.*

George H. Ward, J. S. Engle, Watson & Watson
and Goodrich & Macy, for appellants.

Benjamin F. Marsh, for appellee.

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REINHARD, J.—The complaint, to which a demurrer was overruled, alleges, in substance, that the appellant was duly elected and qualified as clerk of the Randolph Circuit Court, and as such executed to the State of Indiana his official bond, a copy of which is filed with the complaint, in the penalty of \$30,000 with the other appellants as sureties; that while acting as such clerk and in the performance of his official duties in said office, between the 22d day of August, 1885, and the 5th day of March, 1889, the said Leavell collected large sums of money to wit:

Court Docket fees.....	\$4 000
Fines and Forfeitures.....	6 000
Unclaimed Witness Fees.....	1 000
Jury Fees.....	1 000
Money in Estates and Guardianships un- claimed, or money that escheated to the State of Indiana for the want of heirs.....	2 000

Making in all.....\$14 000

That it was the duty of the appellant Leavell to report and pay over to the treasurer of the County of Randolph all of said money so collected by him, but that he failed, neglected and refused to pay over said money or any part thereof at the time, and in the manner required by law, and that he allowed said money to remain in his hands until collected by the assistants of the Attorney-General of said State, before the 5th day of March, 1889; that said Attorney-General and his assistants collected of and received from the State as fees and charges for collecting said money from said Leavell the sum of \$4,200, which said sum the said Attorney-General and his assistants were entitled by law for collecting the same; that said Leavell by so neglecting, failing and refusing to report and pay said money to the treasurer aforesaid, at

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the time and in the manner required by law, did violate the conditions of his said bond to pay to the person entitled to receive the same all moneys that should come into his hands as such clerk during his continuance in office; that because of such violation of said condition of said bond there is now due, owing and unpaid to the State from the appellants the said sum of \$4,200, for which he demands judgment.

The act approved April 11, 1885, provides that it shall be the duty of the Attorney-General to ascertain from time to time the amounts paid to any county or state officer or other person, for unpaid witness fees, court docket fees, licenses, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, or from any other source, when the same is by any law required to be paid to the State or to any officer in trust for the State; and in case of failure, neglect or refusal to so pay such moneys, for twelve months after the cause of action in favor of the State shall have accrued, the said Attorney-General shall institute suit to recover the same. For all collections so made the Attorney-General shall be allowed a commission of 20 per cent. on the first \$1,000, 10 per cent. on sums not exceeding \$2,000, and 5 per cent. on all sums exceeding \$2,000. Acts 1885, p. 192.

The act referred to is amendatory of an act, which took effect March 10, 1873, being an amendment of section 9, of that act. R. S. 1881, section 5668. The provisions of the act of 1885 are identical with those of section 9 of the act of 1873, in so far as they are applicable to the case under consideration.

The act of March 5, 1889, which prescribes the further duties of the Attorney-General makes it the duty of that officer to ascertain from time to time the amounts paid to any county or state officer for un-

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claimed witness fees, court docket fees, licenses, money unclaimed in estates and guardianships, fines, penalties or forfeitures, or moneys that escheat to the State for want of heirs, etc., and in all cases where the officers whose duty it shall be to collect the same shall fail, neglect or refuse to do so, after the cause of action in favor of the State shall have accrued, the Attorney-General shall proceed to collect the same by suit, "and the payment to or collection by the attorney-general of any of the funds aforesaid shall not render the said officers liable to an action on their bonds by any other officer or person." Section 7692, Burns' R. S. 1894 (E. S. section 1805).

It is the duty of the clerk of any circuit court, on or before the first day of January of each year, to make out a complete list of all fines and jury fees collected during the preceding year, and of all witness fees, notary fees, justice fees, and all other fees in his hands which have not been claimed for two years, and to pay to such treasurer all money so collected. Section 7935, Burns' R. S. 1894 (5849, R. S. 1881).

By an act of the general assembly which went in force June 5, 1883, it is provided that any State, county or township officer "whose duty it is by law to report and pay over to the State, or any person for the use of the State, any docket fees, fines or forfeitures, license, unclaimed witness fees and jury fees, money unclaimed in estates and guardianships, or moneys that escheat to the State for want of heirs, or any and all other moneys that any such officer is required by law to so report and pay over, who shall fail so to report and pay over any and all such moneys, at the time and in the manner required by law, and who shall allow any such money to remain in his hands until collected by the Attorney-General by suit or otherwise, shall be liable on his official bond for any

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and all fees, per cent. and charges of said Attorney-General, to which said Attorney-General shall be entitled by law, for collecting the same, and it shall be the duty of the several prosecuting attorneys, within their respective circuits, to bring suit for the recovery of any such sums, and pay over the same to the proper officers." Section 7568, Burns' R. S. 1894 (E. S. section 1981).

It is contended in the first place that the complaint is insufficient because it fails to aver when the appellant Leavell collected the moneys alleged to have been paid over by him to the Attorney-General. If we correctly understand counsel's argument, their position is that if the law of 1885 is applicable, it must appear that this money was in the hands of the clerk for at least a year before he paid it over to the Attorney-General, for under the provisions of that statute the Attorney-General is authorized to collect it only after the expiration of that period of time; but that if the law of 1889 governs and that of 1885 is repealed, then the prosecuting attorney can not bring such an action as this because the act of 1889 expressly provides that the payment to the Attorney-General by the clerk shall not render the latter liable to an action on his bond.

It is true that the statute of 1885 gives the clerk twelve months after collections by him in which to pay over to the treasurer the moneys mentioned in the complaint. But we do not think the complaint subject to demurrer because it fails to specify the time when these moneys came into the clerk's hands. It is averred that he failed, neglected and refused to pay over said money or any part thereof at the time and in the manner required by law, but allowed the same to remain in his hands until collected by the Attorney-General and his assistants. We think the collection

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by the Attorney-General here referred to means a legal and not an illegal collection, and that it was paid over at a time when the latter was in duty bound to collect it. This construction we think fairly inferable from the complaint when its averments are considered as a whole. Otherwise we should have to presume that both the clerk and the Attorney-General violated their duty by transferring the custody of these funds into the hands of an illegal custodian.

Nor are we able to agree with counsel in the contention that the act of 1889 exempts the clerk from liability to be sued on his official bond for the failure to pay such funds to the proper treasurer in case the State has incurred loss in the way of fees to the Attorney-General by reason of such failure of the clerk. It was the duty of appellant, Leavell, on or before the first day of January of each year, to report and pay over to the county treasurer the moneys specified in the complaint, and when he failed to do this, the provisions of the act of 1889, *supra*, made it the duty of the Attorney-General to collect them from him, for which the Attorney-General was entitled to certain fees specified in said act; and by virtue of the law of June 5, 1883, above referred to, it is made the duty of the prosecuting attorney to bring this action on the official bond of the appellant, Leavell, to reimburse the State for the fees and charges of the Attorney-General which it incurred by reason of the failure of said appellant to perform his duty. It is true the act of 1889 provides that when the clerk shall have paid over to the Attorney-General the money which the former should have paid to the treasurer, such clerk shall not be liable on his bond in an action by any other officer or person. But this exemption from liability doubtless has reference to a liability for a second payment, to some other officer of the State, of the money already

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paid to the Attorney-General, in case the latter official should fail to account for it properly. Every statute must be construed according to its spirit and reason, and it would be doing violence to good sense and common honesty to assume that the Legislature intended to place a premium on the malfeasance of officers by taking away a remedy previously given the State for losses that might be sustained by reason of such malfeasance. It is, on the other hand, in consonance with reason and fair dealing to assume that the law makers intended to protect the clerk or other officer in the payment of money to an officer not usually intrusted with the collection of such funds in the ordinary course of his official functions. It was this motive, we think, which prompted the insertion of the clause exempting the clerks or other officer from liability on his bond to any other officer, and not the desire or intention of doing away with a just remedy previously given for losses that might be sustained by reason of the officer's negligence. To construe the act of 1889 as appellant contends it should be construed would be to hold that the law of 1883, making it the duty of the prosecuting attorney to institute such an action as this, was repealed by implication. Repeals by implication are not favored, and when both statutes may well stand together, it is the duty of the courts to construe them *in pari materia*. *Sosat v. State*, 2 Ind. App. 586; *Wright v. Board*, 82 Ind 335; *Leonard v. City of Indianapolis*, 9 Ind. App. 262.

We hold, therefore, that the act of 1883 is still in force and the prosecuting attorney was authorized to bring this action and to maintain it notwithstanding the enactment of the law of 1889 referred to. This construction renders it immaterial to the decision of the question now before us whether the act of 1885, *supra*, is repealed by that of 1889 or not, for if the ap-

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pellant's liability accrued under the act of 1889, construed in connection with section 7935, Burns' R. S. 1894 (5849, R. S. 1881), that is to say, if the appellant, Leavell, failed to report and pay over to the county treasurer by the first day of January, the moneys specified in the complaint, provided they had been collected by him before that date and by reason of such failure the Attorney-General collected them from him, thus subjecting the State to the payment of certain fees and charges, then the appellants are liable even though the act of 1885 has been repealed by that of 1889.

The demurrer was, therefore, correctly overruled.

The appellant, Leavell, filed an application for a change of venue which was overruled and it is insisted that such ruling constituted reversible error.

The affidavit upon which the application was predicated is as follows, omitting the caption:

"Richard A. Leavell, being duly sworn upon his oath, says he is one of the defendants in the above entitled cause; that said cause of action is for alleged breaches of the bond of affiant as clerk of the Randolph Circuit Court, and that affiant is the principal defendant and that all the other defendants are sureties on his said bond; that he makes this affidavit for and on behalf of all the defendants in said action, and affiant says that he believes an odium attaches to him and his defense to said cause, on account of local prejudices, and that he and his co-defendants can not have a fair and impartial trial of said cause in Randolph County, where pending, on account of said odium and local prejudice so attaching to him and his defense to said cause. Wherefore he asks that the venue of said cause be changed from said county."

The affidavit was properly signed and sworn to by Leavell before a notary public of Cook county, Illinois.

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This affidavit was filed in the Randolph Circuit Court on the 8th day of September, 1892, which was the fourth day of the September term, 1892, of said court. No other motion or application for such change of venue accompanied the affidavit at that time. It will be seen from the language of the affidavit, that although it attempts to make the ground of the motion applicable to all the defendants, and states that it is made on behalf of all the defendants, yet the prayer for the change is by Leavell alone; and the record discloses that it was filed by Richard A. Leavell.

Afterward, on the 20th day of October, 1892, the same being the fortieth day of said September term of court, all the defendants in the cause filed a written motion in said court based upon said affidavit for a change of venue, which motion is as follows, with the caption omitted:

"Now come all of the defendants in said above entitled cause, and move the court to grant them a change of venue upon the affidavit of the defendant, R. A. Leavell, now on file from said county of Randolph." This application was signed by the attorneys for the defendants.

Thereupon the court overruled said motion and refused to change the venue of said cause, to which ruling of the court the defendants at the time excepted.

It will be borne in mind that there was no ruling by the court upon any application for a change of venue until after the filing of the motion last above set forth, and that said motion was not filed until the fortieth day of the term. The record further recites that at the time the affidavit was filed "and continuously from the commencement of this suit until this time, there was and still is in full force and effect in said Ran-

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dolph Circuit Court a set of rules for the government of said court and the business thereof, which rules were before said time duly entered and recorded in the order book of said court, and that one of said rules so in force and of record at said time in said court was and is in the following language to wit:

"In civil cases returnable on or after the fourth day of a term, applications for changes of venue or changes of judge must be made on or before the fourth day of the term, and will not be entertained afterwards."

Hence, if the validity of the motion for a change of venue depended upon the filing of the application by all the defendants, that is to say, if the motion for the change could be entertained only upon the filing of said application, and the rule above set out was valid, and such as the court had the right to make and enforce, it being filed long after the day to which the filing of such applications was limited, the refusal to grant the change was properly made and the court committed no error. If, on the other hand, the said application was not essential to the validity of the motion, or if the rule of court was for any reason invalid, and the affidavit itself was all that was necessary to entitle the defendants, or the defendant Leavell to the change of venue, then the court erred in refusing to grant the same.

The question whether the trial court has the power to adopt and enforce a rule of the character of the one now under consideration is no longer an open one, and as a general proposition it is settled that it is not error to refuse a change of venue when the application is made after the time fixed by such a rule of court within which the motion shall be made. *Moulder v. Kempff*, 115 Ind. 459; *Lott v. State*, 122 Ind. 393; *Jones*

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v. *Dipert*, 123 Ind. 549. Where the affidavit shows, however, that the grounds upon which the change is asked was not discovered until after the day fixed by the rule, the party is entitled to the change, and it is not necessary for such party to show that he used proper diligence to discover the cause within the time. *Ogle v. Edwards, Admr.*, 133 Ind. 358.

In the present case it is not shown or claimed that the ground for the change was not known on or before the fourth day of the term.

It follows that if there was in fact no proper application for a change of venue until after the fourth day of the term, such application came too late.

We come then to the question whether the application filed by all the defendants was necessary, or whether the affidavit was itself a sufficient application to entitle the party or parties to such change of venue.

Ordinarily it is not necessary that a separate motion or application in writing for a change of venue should accompany the affidavit. The affidavit itself is a sufficient application if it otherwise conforms to the legal requirements.

The cause assigned in the motion for a new trial as error in overruling the application is by all the defendants collectively. The motion for a new trial is a joint motion by all; but there is no separate motion for a new trial by the appellant Leavell in the record. Indeed there was no ruling by which a change of venue was refused to Leavell or any other single defendant. The only motion ruled upon was that of all the defendants which was made after the fourth day of the term.

The application contained in the affidavit, as we have seen, was made by Leavell alone, and not by all the defendants, although the affidavit states that he

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makes the motion for all. If it was necessary that all the defendants should join in the motion, then the application contained in the affidavit was insufficient, because it was an application only by Leavell and not by all the defendants. There is a wide difference between a motion by one defendant *for* all, and a motion *by* all the defendants.

If we must look to the affidavit alone for the application then the effect of the court's ruling was to deny the application of the defendant, Leavell, alone and not that of all the defendants for they made no such application in the affidavit. The recitals of the records show that Leavell alone filed the affidavit and whatever motion or application it contained. The record states as follows: "Comes now the defendant Richard A. Leavell and files his motion, supported by affidavit for a change of venue," etc. Clearly, therefore, up to and including the time of the filing of the affidavit there was no application for a change of venue by any defendant except Leavell.

Now it seems equally clear that if any error was committed in the overruling of the application contained in the affidavit, such error affected the appellant Leavell alone, and the defendants jointly could not predicate error upon such ruling. Nothing is better settled than the rule that a joint motion for a new trial must be well taken as to all the parties joining in it or there will be no error in overruling it. Elliott's App. Proced., section 839, and cases cited. Here the motion for a new trial on the ground of the alleged error of refusing a change of venue was made by all the defendants jointly. That it is not well taken as to any of the defendants but Leavell must be obvious, for the other defendants had no such ground to assign.

Whether one of several co-parties is entitled to a

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change of venue on his own application we need not decide. It was held in *Peters v. Banta*, 120 Ind. 416, 422, that the provision of the statute that a change of venue shall be granted "upon the application of either party" means all the parties on one side collectively, and that there is no error in overruling the application when it comes from one only of two or more co-parties.

We have considered all the questions presented by the record and find no available error.

Judgment affirmed.

THOMPSON v. THE STATE, EX REL. MCKINNEY.

[No. 1,891. Filed September 29, 1896.]

BRIBERY.—*Hiring Elector to Refrain from Voting.*—Within the meaning of section 6325, Burns' R. S. 1894 (1896, E. S.), providing that whoever hires any elector to vote or refrain from voting any ticket, or for any candidate, shall become liable to the person hired to vote or to refrain from voting in the penalty of \$300.00, it is not essential to a "hiring" that the elector shall have actually carried out his agreement to vote or refrain from voting.

From the Gibson Circuit Court. *Affirmed.*

B. M. Willoughby, Chambers, Pickens & Moores, W. F. Townsend and John Wilhelm, for appellant.

W. A. Cullop, C. B. Kessinger, J. S. Pritchett and Thomas. C. Duncan, for appellee.

Ross, J.—This action was brought by the relator, John McKinney against the appellant, for an alleged violation of section 6325, Burns' R. S. 1894 (1896, E. S.), and to recover the penalty prescribed therein. This section reads as follows:

"That whoever hires or buys, directly or indirectly,

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or handles any money or other means, knowing the same is to be used to induce, hire or buy any person to vote or refrain from voting any ticket or for any candidate for any office at any election held pursuant to law, or at any primary election or convention of any political party, then the person so offending in any one of the foregoing particulars, and all other persons aiding, abetting, counseling, encouraging or advising such acts, shall thereby become liable jointly and severally to the person hired, bought or induced to vote or refrain from voting by the means above enumerated, in the sum of three hundred dollars and reasonable attorney's fees for collecting the same in an action to be brought as hereinafter provided on the relation of the voter in whose favor the liability is created by this section."

It is charged in the complaint that on Tuesday the 8th day of November, 1892, a general election was held in the United States and in the State of Indiana for President and Vice President of the United States, and for electors to vote for President and Vice President of the United States; for Representatives in Congress and for State and county officers in the State of Indiana. That the relator was a duly qualified and legal voter at said election at the first ward precinct in the City of Vincennes, Knox County, Indiana, and on that day he went to said voting place for the purpose of exercising his right of franchise, and of casting his vote for the candidates of his choice, but that the defendant unlawfully gave and paid relator the sum of five dollars not to vote, and to go away without voting, and to refrain from voting; that relator accepted said money for said purpose and went away from said polls without voting. That he went to the polls for the purpose of voting, but that the defendant by the payment of said sum of money did hire, in-

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duce and buy the relator to refrain from voting at such time, the ticket and candidates of his choice.

We deem it unnecessary to set forth the complaint in full, inasmuch as the above extract sufficiently shows the theory upon which the complaint proceeds, and will enable us to pass upon the questions urged on this appeal.

The main contention of the appellant is that there can be no recovery, unless it is shown, in addition to the fact that the relator was hired by the appellant to refrain from voting, that he did not in fact cast a vote at said election; that if he was hired to go away from the polls and refrain from voting at the time he went there for that purpose, but subsequently returned and then cast his vote, no offense was committed; that if he did eventually cast his vote, no damage was done, the relator lost no right, hence no right of action accrued.

The framers of both our national and state constitutions intended that all citizens should have a voice in the government of this country, and to that end guaranteed to each the right of suffrage.

For many years the lawmakers of our State have been striving to formulate laws that will secure the purity and freedom of the ballot; to place such safeguards around the voter that he may freely exercise the right of suffrage and cast his ballot for the ticket or candidate of his choice. This right of suffrage granted to an American citizen, whether manor born or naturalized, is the highest, greatest, and most sacred privilege accorded to man, and is enjoyed to its fullest extent only when the right to exercise it is untrammelled and free. It is a prerogative so sacred that it should not be the subject of barter and sale. It was not designed as a commodity to be placed upon the market and sold to the highest bidder. It is a lib-

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erty, an inalienable right, granted to the individual vouchsafing the equality of all men under a free government. This birthright given to all citizens alike should be most sacredly guarded, and for this reason the knowledge on the part of our lawmakers that it might not be fully appreciated by all to whom it is granted, or that some, who from stress of circumstances should underestimate its value and be willing to part with it for gain, has resulted in the enactment of laws which make not only the one who will thus barter and sacrifice "his honor, his manhood, his political freedom" and "his sovereignty," a criminal, but also brands the one who makes the purchase, furnishes the money, or aids or abets, as a felon.

By section 2341, Burns' R. S. 1894 (2193, R. S. 1881), it is provided that whoever for the purpose of influencing a voter, seeks by violence or threats of violence, or threats to enforce the payment of a debt or to eject or threaten to eject from any house or to injure the business or trade of an elector; or if an employer of laborers or an agent of such employer, threatens to dismiss from service any laborer in his employment, shall be fined not more than \$1,000 nor less than \$20 and imprisonment in the State prison not more than five nor less than one year.

The latter part of this section makes it a crime for an employer or his agent to seek to influence an employe in voting by means of threats to dismiss him from the service.

The object aimed at by our lawmakers has been to prevent both coercion and temptation. It is not always only the corrupt or dishonest voter that when tempted, will part with his honor, his manhood, yea, even his liberty itself, for often times circumstances are such that to refuse means, not only poverty and want for the voter himself, but hunger, misery and

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suffering for his family. When the wealth of the rich, or the strong and powerful influence of the employer is used to so debase mankind, it is well that the law has placed its protecting arm about those so unfortunate as to be subjected to such temptation.

At the same time that the act, of which the section under consideration is a part was passed, another act was enacted, making it a misdemeanor for any person either to "give or offer to give, directly or indirectly, any money, property or other thing of value, to any elector to influence his vote at any regular election," section 2329, Burns' R. S. 1894 (E. S. 321), or to give, offer or promise to give any elector any money, property or thing of value for the purpose of preventing, influencing, inducing or procuring him to refrain from voting or to remain away from the polls. Section 2330, Burns' R. S. 1894 (E. S. 322).

The object and purpose of these two acts, says the court in the case of *State, ex rel., v. Schoonover*, 135 Ind. 526, "were to detect and punish vote buying, and suppress the traffic in human honor, even, if to do so, it became necessary to offer and bestow a premium on one of the culprits. The sanctity of the ballot, the freedom and purity of our elections, were, to them, (the general assembly) of paramount importance to everything else; hence, the one act provided for a civil penalty, and the other for a criminal prosecution for the offense in question, so as to open every avenue to its discovery. Our lawmakers, in their wisdom, concluded to exempt the weak from punishment, and inflict it on the strong. It is an innovation of the policy of the old law, but the act of making merchandise of manhood is of great moral turpitude, the disease was desperate, the remedy heroic, and whether they legislated wisely or not is not for us to say."

The section of the statute under which this action was instituted defines a number of offenses, namely:

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1st, for hiring or buying any person, directly or indirectly, to vote any ticket or for any particular candidate; 2d, for hiring or buying any person, directly or indirectly, to refrain from voting any ticket or for any candidate; 3d, for handling any money or other means, knowing the same is to be used to induce, hire or buy any person either to vote or to refrain from voting any ticket or for any candidate; and 4th, for aiding, abetting, counseling, encouraging or advising either the hiring or buying of a voter either to vote or to refrain from voting any ticket or for any candidate. Any person, therefore, who hires or buys, directly or indirectly, a voter to vote any ticket or for any particular candidate or who hires or buys such voter to refrain from voting any ticket, or for any candidate, or who handles any money or other means to be used to induce, hire or buy any voter, either to vote or to refrain from voting, any ticket, or for any candidate, or who aids, abets, counsels, encourages or advises, either the hiring or buying of a voter either to vote any particular ticket, or for any particular candidate, or to refrain from voting any ticket or for any candidate, is liable under the provisions of said act.

But we are asked to hold that no offense was committed in this instance, unless the relator actually did not cast a vote at the election at which he was hired by the appellant to refrain from voting. Such a construction of the statute would, we think, be a strained one. The plain language of the act conveys to the ordinary mind that the intention of the legislature was to punish the person who hires the voter either to vote or refrain from voting any ticket, or for any candidate whether the voter fulfills his part of the agreement or not. The purpose of the act is to prevent any one from hiring or buying a voter either to vote or to re-

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frain from voting, and not simply to punish because the voter has carried out his agreement. Ordinarily one who makes a contract understandingly, and then purposely refuses to fulfill it, commits a moral wrong, but one who agrees either to vote a ticket or for a candidate other than the ticket or candidate of his choice, commits an unpardonable sin, if he carries out his agreement. It is neither a legal nor a moral wrong to repudiate that which our laws forbid. All of our laws are enacted for the purpose of insuring the peace, prosperity, protection and good behavior of all the people, and to observe them insures good government, while to disregard them brings about disorder, dishonesty and often threatens the stability of the government itself.

The offense charged does not consist in inducing the voter, by hiring him to vote or to refrain from voting a particular ticket or for or against a particular candidate, but it consists in the giving or agreeing to give to the voter something in consideration that he will or will not vote, and the agreement on the part of the voter to so do.

When the appellant gave the relator \$5.00 to refrain from voting and the latter accepted the money, agreeing not to cast his vote, the hiring was completed, the appellant fulfilled his part of the contract, the statute was violated and the right of action accrued. For instance, if, as charged in the complaint, the defendant gave the relator \$5.00 in consideration of which the latter agreed not to vote at said election, the hiring was complete, whether he subsequently voted or not. The language of the statute is plain and unambiguous, and forbids not only the execution, but the making of such contracts. To hire, in its general sense, means the entering into a contract, by which one party agrees to do or refrain from doing some particu-

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lar thing, and on the part of the other an agreement to pay therefor. Of course the ordinary contract of hiring cannot be enforced by one of the parties against the other, unless the party seeking its enforcement has performed or offered to perform his part thereof. The legislature, in the use of the word hire, in this act, did not have in contemplation its use with reference to enforceable contracts, but having in view an evil to be corrected, made use of it in its plainest and broadest sense, for they declare that the person who directly or indirectly hires a voter to vote or refrain from voting, etc., shall become liable to such voter in the sum of \$300.00.

The evident purpose of the legislature was not only to prevent parties from knowingly entering into such contracts, but also to prevent one party from making, by any subterfuge, trick or artifice, any contract or agreement which will prevent the other party from voting any ticket or for or against any candidate. It is no less an offense, under this statute, to hire a voter to change his place of residence, and thus lose his vote, than to hire him to remain away or to go away from the polls and not vote. One who induces a voter, for a consideration to change his residence at a time when to move will destroy his right to vote, even though the real purpose may not be understood by the voter, if done for the purpose of preventing his voting or destroying his right to vote, as also all others aiding, abetting, counseling, encouraging or advising such acts, shall be liable to the person thus hired, as provided in such section.

It is to be regretted that the necessities of the law require, in order to compel an observance of its provisions, that one of the parties to such an infamous contract should be made a beneficiary, but if it were

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not so it would be almost impossible to detect and punish the real criminal.

It is earnestly insisted that the evidence is insufficient to sustain the verdict. In cases of this character the evidence which can be produced to establish the offense is necessarily meagre and limited, because such transactions are usually entered into secretly, with no one present except the parties to it; but when a jury, consisting of the peers of the accused, after hearing the testimony of the parties and being fully advised of the circumstances surrounding the transaction, choose to disbelieve him and to believe the evidence which shows him to be guilty of the crime charged, especially after the trial court has approved the verdict and declared the trial a fair one, this court will not review it if there is any reasonable evidence to sustain the verdict. There is evidence to sustain the verdict of the jury in finding that the appellant did hire the relator to refrain from voting.

The judgment of the court below is affirmed.

YELTON, ADMINISTRATOR, v. KERNS ET AL.

[No. 1,954, Filed September 29, 1896.]

HUSBAND AND WIFE.—*Widow's Statutory Allowance.—Oral Agreement to Relinquish.*—A wife is not bound by an oral agreement to waive or relinquish her statutory allowance in the event she survives her husband, in consideration of the payment by him, in his lifetime, of money to or for the use of another.

From the Henry Circuit Court. *Reversed.*

M. E. Forkner and J. M. Morris, for appellant.

L. P. Mitchell, for appellees.

DAVIS, C. J.—On the 30th day of July, 1894, one Hayden Yelton died intestate. On the 30th day of

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July, 1895, appellant, as the administrator of the estate of said decedent, filed in the office of the clerk of the Henry Circuit Court, his final report and settlement of said estate. Among other items for which he claimed credit was the statutory allowance of \$500.00, paid by him to the widow. Section 2424, Burns' R. S. 1894 (2269, R. S. 1881). The appellees appeared and filed exception to appellant's final report and settlement on the ground that in 1887 or 1888 said widow, who was then the wife of said Hayden Yelton, in consideration of the payment by him of \$500.00 for her daughter, orally relinquished all claims to the statutory allowance of \$500.00 to which she would be entitled in the event she survived him, and that appellant was advised of such agreement before he paid the \$500.00 to her. This exception was sustained and appellant was ordered to correct his report and pay into court the sum of \$500.00 for distribution to the heirs of said Hayden Yelton, deceased.

The only question presented for our consideration is whether a wife is bound by an oral agreement to waive and relinquish her statutory allowance in the event she survives her husband in consideration of the payment by him in his lifetime of money to or for the use of another. In this case nothing was paid by the husband to the wife. The payment was made by the husband for the use and benefit of her daughter. The agreement was not reduced to writing. The theory of appellee is that she said to her husband that if he would advance \$500.00 in the purchase of real estate for her daughter that she would, in the event she survived him, make no claim to her statutory allowance. She then had no vested right to the statutory allowance of \$500.00. It was only a contingent right. This contingent right is given by the statute in the event the wife survives the husband, and in our opin-

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ion the wife is not bound by an executory oral agreement made with her husband in his lifetime to relinquish it for a consideration moving to a third person. *Corcoran v. Corcoran*, 119 Ind. 138, 12 Am. St. 390.

Judgment reversed, with instructions to approve the final settlement report of appellant.

PURVIANCE, ADMINISTRATOR, v. SHULTZ.

[No. 2,001. Filed September 29, 1896.]

CONTRACTS.—*Claim Against Decedent's Estate for Work and Labor.*

—The failure of testator to make a bequest in favor of one who rendered services to him upon a promise that such services should be paid for by such bequest, renders his estate liable for the value of such services.

SAME.—*Infant.*—An infant is competent to make an express contract for the establishment of the family relations between himself and one not related to him by blood or marriage, and thereby prevent his recovery for services rendered in the family.

INSTRUCTIONS.—It is error to instruct the jury, in an action to recover from an estate for work and labor performed for decedent, that if decedent kept the plaintiff, who was a minor and not related by blood or marriage, at her home until her death, and received her work and labor, and furnished her with food, raiment and shelter, the family relationship is not presumed to exist between them, as there is no presumption of law, and the court should never instruct that a presumption which is purely one of fact exists or does not exist.

From the Huntington Circuit Court. *Reversed.*

J. Q. Cline, J. B. Kenner and W. S. Lesh, for appellant.

H. B. Sayler, S. M. Sayler and J. M. Sayler, for appellants.

LOTZ, J.—The appellee brought this action against appellant as the administrator of the estate of Elmina

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E. Purviance, deceased, to recover for work and labor alleged to have been performed for the decedent. There was a trial by jury, which resulted in a verdict and judgment in favor of the appellee in the sum of \$309.00.

The only error assigned in this court is the overruling of the motion for a new trial.

In 1883 John W. Purviance, the husband of appellant's decedent, lived upon a farm in Huntington county, he and the decedent constituting the household. They were childless. The appellee was then about twelve years of age, and she was taken into this home and lived with them until the year of 1887, when John W. Purviance died. After his death the appellee continued to live with Elmina E. Purviance until her death in 1894. The appellee was not related to the deceased by blood. This action was brought to recover for services rendered from 1887 to 1894, and after the death of John W. Purviance.

There was some evidence which tended to show that the decedent intended to pay or compensate the appellee for the services rendered her by making provision for appellee in her will. The court gave this instruction to the jury: "4. An intention to pay for work and labor by one receiving the benefit of such work and labor, may be shown by agreement to pay for such work and labor, by bequest in will by such person so receiving the benefit of such work and labor, and when such an agreement is shown, failure to make such bequest by the person agreeing to do so makes his estate liable for the value of such work and labor, and a claim therefor against his estate is good and may be recovered."

The appellant insists that this instruction is erroneous. But we find no substantial objection to it. It seems to come within the rule declared in *Cariness v.*

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Rushton, 101 Ind. 500; *Wallace, Admr., v. Long, Gdn.*, 105 Ind. 522.

The appellant also insists that instruction No. 5, given by the court at the request of the appellee, is erroneous and had a tendency to mislead the jury. The instruction is as follows: "The family relation between persons not related to each other in any manner by blood or marriage, can only exist on an agreement between such persons express or implied, that they will live together in the family relation as members of the family. An infant under the age of twenty-one years cannot make such an express agreement, and such agreement by an infant under the age of twenty-one years cannot be inferred where such an infant is not in any way related by blood or marriage to the person with whom such infant lives. Therefore, if you believe from a fair preponderance of all the evidence in this case that the said Elmina E. Purviance, deceased, kept the plaintiff living with her at her home until her death and received her work and labor and furnished the plaintiff with food, raiment and shelter, and that said Elmina E. Purviance, deceased, and the plaintiff were not in any manner related to each other by blood or marriage, then the family relationship is not presumed to exist between them; but it is for you to say, from all the evidence in the case, whether the plaintiff and said Elmina E. Purviance, deceased, lived together in the family relation—as members of the same family."

The jury, in an answer to an interrogatory, found that the family relation did not exist between appellee and the decedent during the time the services were being performed.

It is evident that whether or not the family relation existed between the appellee and the decedent at the time the services were rendered was important, for

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the relation in which they stood to each other bore directly on the question of liability.

It is not the law that an infant cannot make an express or special contract. Many special contracts are binding upon him, and he may enforce them or they may be enforced against him. It is true, that he may renounce his contract for services and recover the value thereof regardless of the contract. But even as to such contracts, the fact that he may renounce them does not deprive him of the power of making or enforcing them. Until he chooses to renounce, they are valid. The instruction above does not relate to a contract for services. It relates to a contract for the establishing of the family relation. The jury is told that a minor cannot make an express contract for entering into the family relation.

From the earliest dawn of history the family seems to have been the unit of society; and it is now the most important factor in the fabric of our civilization. *Rountree, Admr., v. Pursell*, 11 Ind. App. 522, 534. The home lies at the basis of our social and civil institutions. This court, on another occasion, by Crumacker, J., said: "The law recognizes the home as the most potent refining and humanizing agency known to our civilization, and its policy is to encourage the extension of its hospitalities to those who by the hand of misfortune may have been deprived of its protection and beneficent influences." *James, Admr., v. Gillen*, 3 Ind. App. 472.

It is the policy of the law to secure homes for the homeless, and it fosters and encourages all contracts, no matter by whom made, which tend to accomplish this end. An infant may make a contract of marriage which results in establishing the family relation, and it is valid. The family relation is not merely a con-

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tract. It is more than a contract. It is a status. When the status is once established it cannot be destroyed simply by repudiating the contract that brought it into existence. To say that a homeless infant cannot secure the benefits of a home with its refining and elevating influences by his express contract is to overthrow the policy of our law.

Again, the instruction under consideration is bad because it says to the jury that from the facts enumerated the family relation is not presumed to exist. When the court undertakes to say to the jury that a certain presumption arises or does not arise from given facts, such presumption must be one of law. Whilst it is true that all presumptions are, strictly speaking, presumptions of fact, yet there are certain presumptions to which the law has affixed degrees of certainty. *Barr, Admr., v. Chicago, etc., R. R. Co.*, 10 Ind. App. 433. There is no rule of law creating a presumption or declaring that no presumption exists from the facts enumerated. The court should have permitted the jury to draw its own inferences from the facts stated, untrammelled by the motions of the court. We think the instruction was erroneous and misleading.

Judgment reversed, with instructions to sustain the motion for a new trial.

CLARK ET AL. v. TRUEBLOOD.

[No. 2,031. Filed September 30, 1896].

PLEADING.—*Action on Lost Note.*—*Complaint.*—In an action on a lost note it is not necessary to the sufficiency of the complaint that the loss of the note should be shown by affidavit, nor is it necessary to aver a search for the note. *p. 99.*

SAME.—*Action by Assignee of Note.*—*Complaint.*—In an action upon a promissory note, brought by assignee against the maker, the com-

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plaint should aver the assignment, but it is not necessary to file with complaint a copy of the endorsement. *p. 100.*

SAME.—Action on Lost Note.—Variance Between Complaint and Exhibit.—In an action on a lost note the variance between the exhibit filed as a substantial copy from the note described in the body of the complaint as to the time of maturity, rate of interest, and attorneys' fees, does not make the complaint bad on demurrer.

SAME.—Action on Lost Note by Assignee, Endorser a Proper Party Defendant.—In an action on a lost note brought by the assignee against the maker, the endorser is a proper party defendant, where it is averred that he claims the ownership of the note. *p. 100.*

BILLS AND NOTES.—Liability of Endorser.—The assignor of a note not payable in bank by his indorsement warrants the liability and ability of the maker to pay it, and is bound, if due diligence be used by the holder, to make good his warranty, but cannot be sued in the same action with the maker as can the endorser of a note payable in bank. *pp. 100–101.*

APPEAL AND ERROR.—Immaterial Variance Between Complaint and Evidence.—Immaterial variances between the complaint and the evidence, which were amendable even after verdict, will be disregarded by the Appellate Court. *p. 101.*

From the Madison Circuit Court. *Affirmed in part and reversed in part.*

W. A. Kittinger and E. D. Reardon, for appellants.

C. L. Henry, Byron McMahan and J. A. Van Osdol, for appellee.

GAVIN, J.—Appellee recovered judgment against appellants upon a lost note. The complaint averred the execution of the note, describing it, and alleged that it had been assigned to appellee, by the payee, by endorsement, but was lost and could not be found. What was said to be a substantial copy of the note was filed with the complaint as an exhibit.

It was not necessary to the sufficiency of the complaint that the loss of the note should be shown by affidavit. *Blasingame v. Blasingame*, 24 Ind. 86.

Neither does the law require that the complaint should aver a search for the note. The necessity for a showing of such a character arises when, upon trial,

the plaintiff seeks to prove the contents of the note. *Douthit v. Mohr*, 116 Ind. 482.

In an action upon a promissory note, brought by the assignee against the maker, it is requisite that he should in the complaint aver the assignment, but he is not required to file with the complaint a copy of the endorsement. *Bozarth v. Mallett*, 11 Ind. App. 417; *Bascom v. Toner*, 5 Ind. App. 229; *Short v. Kerns*, 95 Ind. 431.

The exhibit filed as a substantial copy varies from the note described in the body of the complaint as to the time of maturity, rate of interest, and attorney's fee clause; yet this variance does not make the complaint bad on demurrer. If, as claimed by appellant, the exhibit is a proper one, and therefore a part of the complaint as a copy of the instrument sued on, then the exhibit controls the statements of the complaint so far as there is a conflict between them. *Goodbub v. Scheller*, 3 Ind. App. 318.

If, however, it be unnecessary in a suit upon a lost note to file any substantial copy as an exhibit, then it is not properly a part of the complaint, and is to be disregarded. *State, ex rel., v. Helms*, 136 Ind. 122. In either event the complaint is good against the makers of the note.

The payee of the note, Charles Bookout, was made a defendant. It was averred that he was then claiming the ownership of the note. He was properly made a party defendant to answer as to such claim.

Upon the trial, verdict and judgment were rendered against Bookout for the amount of the note. In this, there was error, as appellee's counsel concede. The assignor of a note not payable in bank by his endorsement warrants the liability and ability of the maker to pay it, and is bound, if due diligence be used by the holder, to make good his warranty of the maker's

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ability to pay. *Huston, Admr., v. First Nat. Bank*, 85 Ind. 21; section 7518, Burns' R. S. 1894 (5504 R. S. 1881).

The endorser of paper negotiable by the law merchant may be sued directly in the action against the makers, but the assignor of paper of the class now under consideration, is liable to suit only after the exercise of diligence against the makers or upon a showing of a lawful excuse for failing to pursue them.

Neither the complaint nor the evidence discloses legal diligence, or excuse for the want of it. Bookout was not therefore liable upon his endorsement.

Counsel earnestly insist that the evidence of appellant Clark that he paid the note stands uncontradicted. This contention cannot be sustained. Clark testifies that he paid the note to the Anderson Banking Co. in February, 1891, and "got the note." Vermillion, however, who was connected with the bank, and with whom the note was left for collection, testifies that in the fall of 1891, about November, he had the note and took it with him to Summitville to make inquiries concerning it, and that it was never paid to him. Manifestly these two statements are not in harmony. If Clark paid it and took it up in February, Vermillion did not have it for collection in November. Each witness confirms the correctness of his statement as to the time of the respective transactions by reference to other facts fixed in his mind; the one by reason of his having drawn \$70.00 of the money from another bank, and still having the stub of the check, while the other made the trip to Summitville shortly before going to California, which was in November, 1891. The evidence was, in our opinion, sufficient. Any inaccuracy in the description of the note in the complaint was cured by the evidence. The variance was immaterial and the complaint amendable as to

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these matters, even after verdict. It must, therefore, be disregarded here. *Steinke v. Bentley*, 6 Ind. App. 663; *Overton v. Rogers*, 99 Ind. 595.

Judgment reversed as to Bookout, and affirmed as to the other appellants, the costs of this appeal to be paid, one-fourth by appellee and the remainder by the appellants other than Bookout; Bookout to recover all his costs in the trial court back to and including the trial.

LIGHT ET AL. v. KILLINGER.

[No. 2,043. Filed September 30, 1896.]

BILLS AND NOTES.—Alteration of Instrument.—The validity of a note having all the essentials of negotiability except the name of a bank at which it is payable is not destroyed by the insertion therein, by the legal holder, of the name of a bank in the blank space after the words "negotiable and payable at," where the insertion was merely by way of a memorandum, and was made in lead pencil, and in a different handwriting from that in the body of the note, and no attempt was made or intended to be made to transfer it to an innocent purchaser, and the action is on the note in its original condition.

From the Marion Circuit Court. *Affirmed.*

William Bosson and *J. W. Claypool*, for appellants.

Jameson & Joss, for appellee.

REINHARD, J.—Killinger sued appellants, Light and Dixon, upon a promissory note, alleged to have been executed by Light to Dixon, and by Dixon endorsed to Killinger. Dixon and Light each filed a separate answer in two paragraphs, the first of which was the general denial, and the second set up a material alteration of the note. The appellee replied by general denial. The cause was submitted for trial

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to the court. When the evidence was closed the appellants filed a demurrer thereto, which was overruled and an exception reserved to the ruling. The sole assignment of error presents the question of the correctness of the ruling of the court in overruling the demurrer to the evidence.

The evidence shows that Killinger was a manufacturer of refrigerators, and sold a quantity of such furniture to Dixon, who took in part payment the note executed by Light to Dixon, reading as follows:

"Indianapolis, Ind., July 31, 1891.

"Sixty ——— after date I promise to pay to W. H. Dixon one hundred dollars, negotiable and payable at ———, with interest at the rate of 6 per cent. per annum from date and 5 per cent. attorney's fees, value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest or notice of protest, and nonpayment of this note."

(Signed) "R. C. LIGHT."

Dixon endorsed the note to Killinger by signing his name across the back. Two or three days before the note matured, Killinger endorsed the same to Balke & Krauss, a business firm in Indianapolis, with whom Killinger had dealings and to whom he was indebted on an account current. It was the practice of these parties that Killinger would turn over to Balke & Krauss notes received by him from his customers, and as payments on such notes were made, they were placed to Killinger's credit. If any note was not paid it was returned to Killinger.

When Killinger endorsed and delivered the note in suit to Balke & Krauss, Mr. Krauss, a member of said firm, asked Killinger in what bank Dixon transacted his business. Killinger answered that he did not know, but would ascertain the fact from Mr. Dixon.

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He saw Dixon and learned from him that it was the Bank of Commerce. He so reported to Mr. Krauss, and the latter thereupon, with a lead pencil, inserted the words "Bank of Commerce" in the blank space left in the body of the note following the words, "Negotiable and payable at." This was done in the presence of Killinger, but not by his direction.

When the note became due Balke & Krauss presented it for payment at the Bank of Commerce, but it was returned to them unpaid, and they returned it to Killinger, who, after repeatedly asking Dixon to pay it, and failing in the collection thereof, at the expiration of more than two years, brought this action upon it.

The suit is brought upon the note as it was before the insertion "Bank of Commerce" was made, said words not being contained in the copy declared upon.

It is the contention of the appellants' counsel that the facts above stated constitute a material alteration of the note made by and while in the hands of a legal holder or owner thereof, and that such alteration destroys the validity of the note and defeats the appellee's right to recover thereon, either in its original or altered form. We have carefully considered the question, and our conclusion is that the court committed no error in overruling the demurrer to the evidence. There was evidence from which the court might legitimately have found, conceding that the insertion was made by the legal holder of the note, although it was shown that the firm of Balke & Krauss only held the paper for collection, that the words "Bank of Commerce" were inserted as a mere memorandum so as to enable the said Balke & Krauss to present it for payment when it became due, inasmuch as Dixon's residence was a considerable distance from their office. The words were written in pencil, and there ap-

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pears to have been no attempt to endorse the note to an innocent purchaser, or to defraud or impose upon any one. It could easily have been seen, at a glance, that they were written by a different hand from those written in ink in the body of the note, and this was sufficient to put any purchaser upon inquiry. No harm has resulted to the maker or any other person from the placing of the words in the blank space. There was no attempt at any time to treat the note as commercial paper, and, as we have said, the action is upon the note in its original form. Even if the appellee had treated the note as one governed by the law merchant, we doubt our authority to hold that the alteration was unauthorized. The note bears upon its face every evidence of one negotiable under the statute as an inland bill of exchange. It contains the usual stipulation in such paper "that the drawers and endorsers severally waive presentment for payment, protest or notice of protest and nonpayment." It also contained the incomplete sentence "Negotiable and payable at," followed by a blank space. Under such circumstances the place of payment may be filled by the holder. *Rand. Com. Paper*, section 186, and cases cited.

Of course, to make the paper negotiable by the law merchant, it must be made payable at a bank in this State. Section 7520, *Burns' R. S.* 1894 (5506 *R. S.* 1881). But when a bank is named in the note, without naming the state in which it is located, it will be presumed that such bank is within this State. *Indianapolis, etc., Co. v. Caven*, 53 Ind. 258; *Henderson v. Ackelmire*, 59 Ind. 540; *Clark v. Carey*, 63 Ind. 105.

Hence, if the note had been made payable at the Bank of Commerce it would have been a negotiable instrument under the statute. The words inserted were not repugnant to the plain purport and tenor of

the contract, but in harmony with it. This being so, in the absence of any agreement or direction to the contrary, would the holder not be authorized impliedly to fill up the blank space, and if so, could the note not be collected, even in its changed form, especially by an innocent holder? *Spitler, Admr., v. James*, 31 Ind. 202; *Luellen v. Hare*, 32 Ind. 211; *Gillaspie v. Kelley*, 41 Ind. 158; *Blackwell v. Ketcham*, 53 Ind. 184; *Emmons v. Meeker*, 55 Ind. 321; *Marshall v. Drescher*, 68 Ind. 359; Rand. Com. Paper, section 123. As to this, however, we need not decide.

The rule is different, of course, where the note, perfect in its terms, is a non-negotiable one, but is changed so as to make it negotiable. *Cronkhite v. Nebeker*, 81 Ind. 319; *De Pauw v. Bank of Salem*, 126 Ind. 553, 10 L. R. A. 46. In such a case the holder would have no implied authority to change the purport of the note by filling the blank space with matter which is foreign to the apparent purpose for which the blank has been left. *McCoy v. Lockwood*, 71 Ind. 319.

There may also be instances when the maker would be liable to a *bona fide* holder without notice of the alteration, while not liable to the original payee or an endorsee who made the change. See *Cronkhite v. Nebeker*, *supra*.

But we have no such case here, nor do we hold that in the present case the maker is liable because he conferred an implied authority to fill up the blank space, for the appellee has not sought to hold him responsible on that ground. What we do decide is, that there was no material alteration, or at least that the trial court had the right so to conclude from the evidence.

That a material alteration of a note made by the holder will discharge the maker from liability on the

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instrument there can be no doubt under the authorities. 1 Am. and Eng. Ency. of Law, 508. But in the present case there was evidence from which the court could easily have drawn the inference that the pencil writing was made as a mere memorandum, without any intent to defraud and without any intent to change the character of the obligation.

In *Horst v. Wagner*, 43 Ia. 373, the payee, desiring to transfer the note, ignorantly erased his own name and wrote instead the name of the transferee. He afterward restored the note to its original form and endorsed it, and it was held in an action on the note that the alteration was immaterial.

An author of recognized standing says: "There may be many cases of innocent material alterations in which it would work injury, loss, or inconvenience to confine the holder to a suit upon the original consideration. If the endorser were sued, and were held liable, he could not have the maker's note restored to him as a foundation for his action if it were utterly annihilated by the alteration. And the endorsee might have rendered such a consideration as could not be recovered back; for instance, professional services, labor, or another note. For these reasons it would seem just to allow a more specific remedy; and while we have seen no precedent which so decides, it has been suggested that a court of equity would, under its jurisdiction over mistakes, correct an alteration innocently and mistakenly made, and restore the instrument to its original form. And there is no sufficient reason why the party should not himself be permitted to undo what he has mistakenly done, provided no other person has become so situated toward the instrument that it would operate prejudicially upon him. The burden of proving innocence would be a sufficient safeguard to prior parties; and when inno-

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cence is clearly proven, and the *prima facie* presumption of guilt overthrown, it would seem too rigorous to inflict upon the innocent a penalty only deserved by the guilty." 2 Daniel Negotiable Instr., section 1414.

In a Pennsylvania case, where within an hour after the note was signed, the payee returned to the maker's office, where the clerk, at the payee's request, but without the knowledge or consent of the endorser, inserted the words "with interest," the maker ratifying the action of the clerk, but subsequently the payee had the inserted words expunged, apparently with chemicals, and sued the maker upon the note in its original form, the latter resisted payment on the ground that the note had been altered, but it was held that, no fraud having been intended, the plaintiff had a right to restore it to, and sue upon it, in its original form, Thompson, C. J., saying: "Now it seems to me, that, as the identity of the note remained and there was nothing in it to enlarge the obligation of the endorser, and as what had been done was innocently, but mistakenly done and expunged for aught we know, within the hour after it had been done, there is no rule of law unreasonable enough to hold it avoided by this. I admit that if there had been evidence of a fraudulent tampering with the note, a different rule would apply. But regarding it as mistakenly done, in an attempt to make the note comply with the contract, and assented to by the original parties, one of them the principal in it, and without fraud, ought the consequences of such an act, done under such circumstances, be made to rank with fraud and perjury? It ought to be regarded as it manifestly was, to the endorser, immaterial." *Kountz v. Kennedy*, 63 Pa. St. 187.

In *Shepard v. Whetstone*, 51 Ia. 457, 1 N. W. 753, a blank in the note, after the word "at" was filled

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without any fraudulent design, with the words "with ten per cent. interest from date." The note was subsequently restored to its original form and negotiated to an innocent holder without notice. It was held that he could recover on the note.

In *Am. Nat. Bank v. Bangs*, 42 Mo. 454, there had been added at the foot of the note, to the left of the signature, the words "at Goodyear Bros. & Durand's, New York, Jan. 10-13," after the words "due at." It was urged that this was such a material alteration as would avoid the note. The court held that the words were to be taken as a mere memorandum and, therefore, immaterial, the court saying: "It should be kept in mind that this action is against the makers themselves. It is not declared upon as a note payable at the city of New York. * * * The memorandum in this case does not increase or vary in any respect the liability of the defendants, and therefore presents no obstacle to the recovery of the plaintiff."

As said by Lotz, J., in *Kingan & Co. v. Silvers*, 13 Ind. App. 80: "No direct injury was done the defendants by the alteration of the note. The utmost that can be said is that a rule of public policy was violated. The doctrine of public policy, like the statute of frauds, should be invoked to prevent and not to perpetrate a fraud. A clear and unmistakable case of the violation of a rule of public policy should be made before the law will lend its aid to depriving one person of his property for the benefit of another." See also *Palmer v. Largent*, 5 Neb. 223; *Derby v. Thrall*, 44 Vt. 413.

The court did not err in overruling the demurrer to the evidence.

The judgment is affirmed.

THE NATIONAL FIRE INSURANCE COMPANY, ETC.,
v. STREBE.

[No. 2,198. Filed September 30, 1896.]

PLEADING.—Action on Insurance Policy.—Complaint.—In an action on an insurance policy an allegation that the policy was in the possession of the company, and that its agent refused to deliver it up on demand, saying that he had sent it to the company, and that the company was not liable and would never pay the holder anything, is a sufficient excuse for not setting out a copy of the policy, and for not averring that proof of loss had been made as required by the terms of the policy.

APPEAL AND ERROR.—Interrogatories to Jury.—New Trial.—The submission or refusal to submit interrogatories to a jury as a part of its special verdict, is a matter arising upon the trial, and unless the rulings of the trial court is made a cause for a new trial they cannot be assigned as error on appeal.

From the Tippecanoe Superior Court. *Affirmed.*

W. C. Mitchell and J. M. La Rue, for appellant.

R. P. Davidson and Thompson & Storms, for appellee.

LOTZ, J.—The appellee brought suit against appellant on a fire insurance policy. Issue was joined. Trial by a jury and a special verdict returned, on which the court rendered judgment for the appellee.

The first assignment of error calls in question the sufficiency of the complaint.

No copy of the policy is filed with the complaint, but it was alleged that the policy was in the possession of the company, and that its agent refused to deliver it up on demand, saying that he had sent it to the company and that the company was not liable and that it would never pay her any part of it.

This is a sufficient excuse for not setting out a copy of the policy. *Walter A. Wood, etc., Co. v. Irons*, 10 Ind. App. 454. It is also a sufficient excuse for not aver-

ring the making of the proof of loss as required by the terms of the policy. *Continental Ins. Co v. Chew*, 11 Ind. App. 330.

The second, third, and fourth assignments of error are as follows:

"2. The court below erred in striking out and refusing to submit to the jury interrogatories 14, 15 and 16 asked by the appellant.

"3. The court below erred in submitting to the jury interrogatories 9 and 10 asked by the appellee.

"4. The court below erred in submitting to the jury over appellant's objection interrogatories 25, 26 and 27 asked by the appellee."

The rulings on the objection and the submission of these interrogatories occurred on the trial of the cause and they should have been made cause for a new trial and can not be separately assigned as error in this court. The general rule is that all rulings which are connected with the trial proper, and which can be corrected if erroneous by granting a new trial, must be made a cause for a new trial, and cannot be independently assigned as error on appeal. *Elliott's App. Proced.*, section 350.

All rulings which properly pertain to the determination of the issues of fact and which arise during the trial thereof must be presented to the trial court by the motion for a new trial. Unless the trial court is given an opportunity to correct such rulings the error is waived. The submission or refusal to submit interrogatories to a jury as a part of its special verdict is a matter arising upon the trial of the cause.

The rulings complained of were not made causes for a new trial. No question on the rulings are properly presented to this court.

The fifth error assigned in the overruling of the appellant's motion for judgment on the special verdict.

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The verdict contains some unnecessary matters; but disregarding these, the findings clearly entitle the appellee to the judgment rendered in her favor. There was therefore no error in overruling the appellant's motion for judgment.

It is lastly contended that the court erred in overruling the appellant's motion for a new trial.

It is insisted that the verdict and findings are contrary to the evidence and law. A consideration of the evidence shows that it is conflicting on many essential points. This court is not authorized to disturb the verdict under such circumstances.

It appears from the evidence that the appellant had insured the building for the appellee for a number of years and that its agents had issued the policy and given her time in which to pay the premiums. The premium had been paid from time to time by the appellee to appellant's agents and receipts were issued for such payments. The appellee was permitted over appellant's objection to read some of these receipts in evidence. We think there was no error in this as this evidence tended to show the manner in which the business was transacted between the parties.

We find no reversible error in the record.

Judgment affirmed.

MATTIX, ADMINISTRATRIX, v. LEACH ET AL.

[No. 1,802. Filed May 7, 1896. Rehearing denied September 30, 1896.]

BILLS AND NOTES.—*Purchase of Note by Maker Who Has Been Discharged in Bankruptcy.*—A creditor who sells a claim to a debtor who is under no legal liability to pay the same, because of his discharge in bankruptcy, cannot thereafter question his capacity to purchase on the ground that such debtor would not be permitted to enforce it against his sureties. pp. 115, 116.

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SAME.—Executory Sale of Note.—The sale of a negotiable promissory note is executory merely, and the title does not pass, where at the time of the contract of sale the note was not delivered, and the time for delivery was not fixed, although there was a partial payment at the time of sale, and further future payments of the consideration. *pp. 116–118.*

BANKRUPTCY.—Partnership Debt.—An individual discharge in bankruptcy, purporting to relieve the bankrupt from all debts provable against him, operates upon partnership as well as individual debts, although the partnership was not brought into bankruptcy. *p. 120.*

From the Tipton Circuit Court. *Reversed.*

B. C. Moon and Conrad Wolf, for appellant.

J. C. Blackledge and C. C. Shirley, for appellees.

GAVIN, C. J.—Appellant sued upon a promissory note executed to the decedent whose estate she represents. Judgment was rendered in favor of appellees upon a special verdict. The questions we are called upon to decide arise upon this verdict. The material facts are as follows:

April 2, 1877, E. W. Hinton and John M. Leach, partners, executed their firm note for \$700 to the decedent, James Mattix, with appellees, Sumption and Charles Leach, as sureties. August 31, 1878, said John M. Leach filed in the United States District Court his petition in bankruptcy asking to be discharged from all debts embraced within the bankruptcy law and including said note sued on. May 12, 1879, he was duly discharged from all debts provable under such law. Soon after its execution the other makers of said note also became insolvent and so remained for several years. "In view of the insolvency of said makers and the uncertainty of ever being able to collect anything upon said note, the said James Mattix entered into a verbal agreement with said John M. Leach in the latter part of 1881, or early part of 1882,

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for the purchase of said note. That subsequent to such discharge in bankruptcy, said note remaining wholly unpaid, said defendant, John M. Leach, purchased the same and the indebtedness evidenced thereby against his co-defendants, agreeing to pay therefor the sum of \$350; said sum to be paid by the sale and transfer to said Mattix of a certain icehouse, in the city of Kokomo, Howard county, Indiana, at the price of \$200, and the additional sum of \$150 to be paid in ice and brick from time to time; said Leach being then engaged in the brick and ice business and said Mattix being a customer of his. That said Mattix agreed to receive the property so mentioned in full payment of the purchase price of said note and to transfer and deliver the same to said John M. Leach in consideration thereof. Pursuant to said contract of purchase said Leach did, at that time, transfer and deliver said icehouse to said Mattix, and thereafter from time to time until the year 1885 furnished said Mattix, as requested, brick and ice in payment of the balance due on the purchase price of said note to the amount of about \$125, the same being received by said Mattix and applied by him on said \$350 indebtedness." In 1885 said Leach tendered Mattix \$25 in payment of the balance then due on said contract demanding the delivery to him of the note; but the note was at that time lost, as stated by Mattix, and could not be found, and said Leach refused to pay said sum until the note was found and delivered to him. Mattix then agreed to look it up and bring it around so that Leach could get it, but the note continued lost until 1891 when it was found. Mattix did not then deliver it up to Leach, but demanded payment from the sureties, although Leach tendered him \$50 in payment of the balance due on the contract price, which was rejected, but the tender has not been kept good.

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Appellant argues first, that Leach being an original maker of the note could not become a purchaser even after he had been discharged in bankruptcy; second, that were he capable of being a purchaser that the sale was executory merely, and the title never passed to him; third, that Leach's discharge did not operate upon this debt because the discharge was individual and the debt was partnership.

In support of this first proposition appellant cites *Cox v. Hodge*, 7 Blackf. 146; *Klippel v. Shields*, 90 Ind. 81; *Montgomery v. Vickery*, 110 Ind. 211; *Coleman v. Coleman*, 78 Ind. 344. In each of these cases, however, the question under consideration, and that decided, was that one legally bound to pay a debt could not, by a form of purchase, keep it alive and enforce it against his co-obligors, although in the case last cited the court says: "That the sale and transfer of an obligation of a partnership to one of the members operates as a payment, *under ordinary circumstances*, results necessarily from the relation of the purchaser to his co-partners, and from the fact of his being himself a principal debtor. Under supposable circumstances, it may be that in equity the partner, who had taken assignments of the obligations of the firm to himself, would be permitted to keep them alive and enforce them against his copartners for their contributive share of the sums which he had paid for the assignment. This might be done for the purpose of giving him the benefit of securities incident to the debts, when necessary to the doing of justice between the partners, if it could be done without injury to any creditor of the firm." (The italics are our own.)

Thus the court clearly recognizes that, as between the debtor and creditor, there may be a sale and transfer, and that, under exceptional circumstances, the instrument might be kept alive as between the

debtors. We are unable to see any solid ground upon which the creditor should be permitted to rest a claim to dispute the capacity to purchase, of the one to whom he sells, he being at the time under no legal liability to pay the debt. As to the effect of the purchase as between the several debtors, the creditors have no interest. We regard it as undoubtedly true that the bankrupt would not be permitted to enforce against his sureties the note thus purchased. To hold otherwise would be in the highest degree unconscionable. The bankrupt after discharge is, indeed, no longer under legal liability to pay the debt. He is not, however, an entire stranger thereto. There remains the moral obligation to pay, by virtue of which, when the characters of principal debtor and creditor meet in him, they become fused, and the debt is, as to the surety, at least, extinguished upon a principle somewhat analogous to the confusion of the jurist of the civil law. *In re Burton*, 29 Fed. 637; *Post, Admr., v. Losey*, 111 Ind. 74; Story on Prom. Notes, section 439; 1 Pothier on Contracts, 607, *et seq.*

Appellees base their claim to judgment upon the proposition that by the contract of purchase the equitable title to the note passed from Mattix to John M. Leach who thereby became the absolute owner of it. Then, they assert, the decedent being no longer the owner, the action cannot be maintained. Numerous authorities are cited to sustain the position taken, most of them involving sales of goods and chattels of various kinds. These we do not deem it necessary to take up in detail, since, with whatever favor we might view the question, were it an open one, the Supreme Court has closed the door to our favorable consideration of it by its decision in *Weader v. First National Bank*, 126 Ind. 111.

In that case one Reiffel had executed her note to

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West from whom Weader, a butcher, on July 10, 1887, "purchased" it for \$100, payable in cash or meat from time to time at West's option. Fifty cents' worth of meat was paid upon it at the time, and \$20 worth prior to Nov. 1, following. The note was not delivered to Weader at the time of the purchase, because West did not have it with him. Nov. 1, 1887, Weader was notified that Reiffel had transferred to the bank a note executed by him to her. Upon Nov. 3, West, in pursuance of the previous contract of purchase, delivered the note to Weader, who sought to use it as a set-off against his note held by the bank. Thus the ownership of the note on Nov. 1 was the vital question. If Weader owned it he could set it off. Otherwise he could not. If Weader did not own it then West remained the owner.

In addition to the facts set forth by the court an examination of the record discloses that West had written his endorsement upon the note prior to Nov. 1. The court held first, that it was not requisite that Weader should then have been the legal owner of the note, but that it would suffice if he were the equitable owner. It further decided that he was not even the equitable owner. We quote from the opinion to show the full extent of the holding. "In *McCormick v. Eckland*, 11 Ind. 293, this court held that an assignment of a promissory note is incomplete without delivery.

"The case above was approved and followed in *Wulschner v. Sells*, 87 Ind. 71.

"In *Mendenhall v. Baylies*, 47 Ind. 575, it is said that to pass the title to a promissory note, either from the maker to the payee, or from the payee to the endorsee, there must be a delivery, actual or constructive.

"Under the contract of purchase here in question no time was fixed within which the note was to be

delivered by West to the appellant [Weader], and until delivery there was no transfer of ownership.

"The appellant was not in a condition to maintain replevin for the note, had West, upon demand, refused to assign the note; the contract was but an executory contract for the purchase and sale of the note. Had West, after making the contract, brought suit against Mrs. Reiffel on the note, she could [not] have made a successful defense to the action on the ground that he was not the party in interest."

The word "not" which we have enclosed in brackets is omitted from the printed report of the case in 126 Ind. on p. 113. It is in the original opinion, however, and in the 25 N. E. on p. 888. The context, even without the original opinion, shows that the omission is a mere clerical error. Again the court says: "When the appellant received notice that the appellee held his note he was not in a position to maintain an action against Mrs. Reiffel on the note she executed to West."

We are wholly unable to distinguish this case in hand from the one to which we have just referred. Whatever differences there may be in the facts, make the Weader case the stronger one to support a conclusion of an executed purchase. In both we have a finding of a "purchase" of the note. In both there is a partial present payment and further future payments, but never full payment. In neither is the note delivered at the time of the contract of purchase nor any time fixed for delivery. In the Weader case a reason is given for the nondelivery at the time. In this case there is none. The loss of the note is indeed presented as cause for nondelivery several years later.

We are, under this authority, constrained to hold that the purchase of the note in 1881 was executory merely, and that the title to the note did not pass.

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Counsel for appellant assert that, regarded as an executory contract for the purchase and sale of a chose in action, there could not be any specific performance, but that the decedent had a right upon tender of the balance due to refuse to carry out the contract, and that Leach was then remitted to his action for damages. Had the tender been kept good we should in view of some of the evidence tending to show a waiver by Mattix of his right to demand ice and brick and a willingness to accept money, be slow to adopt this position. Usually specific performance will not lie to enforce an executory contract for the purchase of personal goods and chattels. *Platter v Acker*, 13 Ind. App. 417; *Morgan v. East*, 126 Ind. 42.

This rule, however, is not inflexible. The circumstances of a case may be so peculiar as to create special equities which can only be protected by specific performance. Under such circumstances courts of chancery have often afforded relief either affirmatively, or, where the parties are on the defensive, by regarding that as done which should have been done. Story's Eq., sections 618 to 622 inclusive; 3 Pomeroy's Eq., section 1402; Fry on Sp. Perf., section 32. *Very v. Levy*, 13 How. (U. S.) 345; *Cutting v. Dana*, 25 N. J. Eq. 265; *Wright v. Bell*, 5 Price Exch. 325; *Adderley v. Dixon*, 1 Sim. and S. 607; *Sup. Lodge K. of P. v. Sourwine*, 15 Ind. App. 489.

The fact that if the sureties are compelled to pay this note they are, by reason of John M. Leach's discharge, remediless, while if his contract is enforced, they are protected, would appear to create a strong equity in their favor. Since, however, the case is not presented to us upon facts bringing these propositions before us, we do not undertake to decide them authoritatively. Appellant claims that John M. Leach's dis-

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charge in bankruptcy does not free him from the debt sued on. Whether an individual discharge operates upon firm debts when the firm has not been brought into bankruptcy is a much vexed question as to which the authorities are in hopeless conflict. Quite a number sustain the negative of the proposition. *In re Noonan*, 18 Fed. Cases, 298; *Hudgins v. Lane*, 12 Fed. Cases, 800; *In re Little*, 15 Fed. Cases, 598; *In re Grady*, 3 N. B. Reg. 228; *Corey v. Perry*, 67 Me. 140.

In some of these cases the question was only incidentally involved. In that last cited, it appeared that the bankrupt did not mention the firm debt in his schedules nor ask to be discharged therefrom.

Other decisions of the same judges or others following in the line of these, but limiting the expressions used in them, declare that the discharge is effective, unless there were partnership assets at the time of the adjudication, and that the burden of showing assets rests upon the creditor. *Crompton v. Conkling*, 15 N. B. Reg. 417; *In re Johnston*, 17 Fed. 71; *In re Plumb*, 19 Fed. Cases, 886.

There are authorities, however, maintaining that the discharge does operate upon partnership as well as individual debts. These we believe to be founded upon better principle. The discharge purports to relieve the bankrupt from all debts provable against him. Firm debts are undoubtedly provable against the individual estate. It is true they may not, under some circumstances, be permitted to share in the assets until the individual debts are paid, but that does not prevent their being proved and their holder's exercising certain rights allowed creditors. It may be that a firm is abundantly solvent when the adjudication is made, so that there is no cause to bring it into bankruptcy, or it might be that the individual is

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insolvent merely by reason of the deficit of partnership assets.

As it seems to us the firm debts are fairly within the province of the statute and the discharge. Judge Lowell, in *Wilkins v. Davis*, 15 N. B. Reg. 61, discusses the question elaborately, collates the authorities and sustains his decision by sound logic.

The majority of the court is of the opinion that the ends of justice will be subserved by directing a new trial. The judgment is accordingly reversed with such direction.

RAREY v. LEE.

[No. 1,850. Filed June 9, 1896. Rehearing denied Sept. 30, 1896.]

DAMAGES.—*Diverting Water From Its Natural Course.*—It is an actionable wrong for one landowner to divert the natural course of water that falls upon his lands, and cast it upon the lands of others to their injury.

SPECIAL VERDICT.—A special verdict must find every fact essential to support a recovery for the plaintiff before a judgment can be rendered in his favor.

DAMAGES.—*Diverting Water From Its Natural Course.*—*Special Verdict.*—In an action for damages for unlawfully flowing water on plaintiff's lands, a special verdict which finds that the flow of water was principally due to the natural lay of the land, but that "some water" which would not naturally have flown upon plaintiff's land, was turned upon it by a ditch constructed by defendant, is not sufficient to support a judgment for any amount in the absence of a finding that an appreciable amount of the damage was due to the water which came through the ditch.

From the Howard Circuit Court. *Reversed.*

Conrad Wolf, for appellant.

J. C. Blacklidge, C. C. Shirley, Milton Bell, W. C. Purdum and B. C. Moon, for appellee.

LOTZ, J.—The appellee was the plaintiff, and the appellant the defendant in the court below. The following facts appear from the special verdict.

In 1887 the plaintiff and defendant were the owners of adjoining lands. On the defendant's land there was a ridge or natural water-shed extending in a general northeasterly and southwesterly direction. All the water falling on the lands naturally flowed to the east and south; and to the north and west. The waters falling on the lands east and south of the ridge flowed away from the plaintiff's lands and no part thereof came upon the same. The defendant cut two ditches across this ridge and caused a part of the water which naturally flowed to the south and east to flow to the north and west upon the plaintiff's land. The plaintiff instituted a suit in the Howard Circuit Court to enjoin the defendant from flowing such water upon his lands and for damages; and such proceedings were had therein, that it was adjudged and decreed that the defendant be perpetually enjoined from flowing such water upon the plaintiff's land.

In 1891 the plaintiff commenced another action in the same court to recover damages of the defendant for a violation of the injunction, and such proceedings were had therein that the plaintiff recovered a judgment against the defendant for damages. See *Rarey v. Lee*, 7 Ind. App. 518.

After the rendition of the first judgment the defendant cut off one of the ditches across the ridge so that no water ever thereafter flowed through it. And after the trial of the second case, and before the judgment was rendered therein the defendant placed a dam across the other ditch. And in a few months thereafter placed two other dams across said ditch. On the plaintiff's land there was a depression or pond, the lowest part containing about four acres. This

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pond was the bottom or lowest part of a basin containing about twenty or twenty-five acres. The outer edge of the basin was about eight feet higher than the bottom. The water falling on defendant's land west and north of the ridge, and upon other lands near by naturally flowed into the basin. There were three other ponds, two upon defendant's land, and one upon adjoining lands, the waters of which naturally flowed into the basin through ditches. And the water from a large tract of adjoining lands naturally flowed into said basin. Extending westward there was a public ditch which drained the basin. The verdict further states that during unusual rainfall the water which flows naturally into the basin runs rapidly to the bottom and overflows the same. At other times the basin was not overflowed. During the years of 1892 and 1893 the plaintiff had crops planted in the depression or basin. These crops were damaged to the extent of \$100 by the overflowing water. It is further found "that since the construction of the first of the dams above described, some water had been flowed from defendant's land lying east of said elevation and ridge besides what would naturally flow over the surface of the earth at the time of unusual rain and freshets. * * * We further find that damages to plaintiff's crops and land was caused by an overflow of water that naturally flows and has its outlet on the lands of the plaintiff; which overflow of water was occasioned by unusual rainfalls that occurred during these years and the water which flowed through the three dams."

The court overruled the defendant's motion and sustained the plaintiff's motion for judgment on the verdict, and rendered judgment for the plaintiff in the sum of \$100. These rulings are the only errors assigned in this court.

It is an actionable wrong for one landowner to di-

vert the natural course of water that falls upon his lands and cast it upon the lands of others to their injury. Such is the cause of action alleged and sought to be established in this case.

The rights of the parties with reference to flowing the water were established by the former adjudications. This action is for a positive, aggressive wrong; the violation of the order of the court, and not for mere passive negligence. The injury to the appellee's crops was occasioned by water arising from two sources; that which passed through the ditch across the ridge, and that which fell on the west side of the ridge. Whatever damage was done by the water which flowed across the ridge, the appellant must answer for, but he is not responsible for the damage caused by the water which naturally flowed into the basin on the west side of the ridge. The finding is that "some water" flowed over the ridge. The word "some" is here used to define the quantity of water; and as applied to quantity it is a very indefinite term. It is true it means an appreciable amount, but that amount may be a pint or a million gallons. Conceding that the "some water" might have contributed to the injury, still the finding is that there was another proximate cause which was capable of producing the whole injury,—the water which fell upon the west side of the ridge. The appellant is not responsible for this cause. This is not like a case where one person sets in operation a dangerous force, nor is it like a case where the negligence or wrong of two or more concur in producing an injury. One of the causes was not of human agency, and no one is responsible for the injury caused by it. While the two causes may each have contributed to the injury the appellant should not be held responsible for the

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whole. What he did was not a public nuisance. *City of Valparaiso v. Moffitt*, 12 Ind. App. 250.

The verdict does not separate the damages which were caused by the two separate causes. Nor is there any means by which the damages caused by each can be ascertained.

The appellee insists that if the verdict is sufficient to support a judgment for any amount that the motion for a judgment in his favor was correctly sustained. That if there was any error in the amount that could only be reached by a motion for a new trial or to modify, and that as no error is assigned on either of these motions the presumption is that the court properly instructed the jury as to the measure of damages, and that there was evidence from which the jury might have fixed the damages caused by the appellant's wrong in the sum of \$100.

But there is another rule that must be borne in mind. A special verdict or finding must find every fact essential to support a recovery for the plaintiff before a judgment can be rendered in his favor. And such facts must not be left to inference or doubt. In the verdict before us we have a finding that there was one cause for which no one was responsible, sufficient to have produced the whole injury, and there is no finding that the cause for which the appellant was responsible caused any specific or appreciable part of the injury. Under the rule the verdict is insufficient to support a judgment for any amount against the appellant. The amount of damages caused by the appellant's wrong is conjectural.

The appellee further contends that as the wrongful character of the appellant's act had been judicially determined, and that as this action is based upon the violation of a positive order of the court, the jury had the right to award exemplary damages to compel the

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appellant to abate the nuisance. It is apparent, however, that the verdict did not include anything as exemplary damages. The damages are fixed in exactly the same amount as that done to the crops.

The water that naturally flowed into the basin came from a large tract of adjoining lands. The water that flowed over the dams in comparison was small. If any substantial damage were caused by the waters that overflowed the ridge the appellant should be required to answer therefor. But there must be a finding of substantial damages. "*De minimis non curat lex.*" The law does not regard trifles. If but a pint of water overflowed the dams and commingled with the waters which naturally flowed into the basin and contributed its insignificant part to the injury, this would be so trifling that the law would take no notice of it.

It appears that the water west of the ridge was sufficient to produce the whole injury, and it does not affirmatively appear that the "some water" produced any substantial part of the injury. In the absence of such finding the verdict is insufficient to support the judgment.

Judgment reversed with instructions to sustain the appellant's motion for judgment on the verdict.

THE PEOPLE'S MUTUAL BENEFIT SOCIETY v. TEMPLETON.

[No. 1,962. Filed October 1, 1896.]

PLEADING.—*Answers.*—*Proof.*—Where there are two paragraphs of answer, one in confession and the other in denial, the plaintiff cannot treat the answer in confession as dispensing with the proof of the facts put in issue by the paragraph in denial.

LIFE INSURANCE.—*Insurable Interest.*—The legal liability of a mother to support her son unless he is unable to earn a livelihood, and she is able to provide for his support, created in behalf of the

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county or town by the laws of Illinois, does not give a son an insurable interest in the life of his mother, where the latter is seventy-six years old when the policy on her life is issued, and there is nothing to justify an inference that she had or would ever have sufficient ability to support him.

SAME.—Policy.—Incontestable Clause.—A provision on the back of a certificate of insurance that it shall be incontestable "after one year from the date as provided in the by-laws," does not render it incontestable upon the death of the insured seven years after its date, where the by-laws provide that the certificate shall be incontestable in case of all deaths occurring "within three years" from the date of the certificate.

From the Elkhart Circuit Court. *Reversed.*

J. S. Dodge, O. Z. Hubbell, J. M. Van Fleet and Vernon Van Fleet, for appellant.

R. M. Johnson, J. D. Osborne, J. L. Harman and A. S. Zook, for appellee.

DAVIS, C. J.—The appellee sued appellant upon a certificate of life insurance. It is alleged in the first paragraph of the complaint that appellant issued to appellee a policy on the life of his mother for \$2,000, alleges the death of the assured, the payment of all assessments, and performance by plaintiff of all conditions and stipulations of the contract on his part; asserts the liability for support of assured by plaintiff under the laws of Illinois, where both the beneficiary and the insured lived at the date of effecting the insurance; makes so much of the statute of Illinois as sustains this allegation a part of the complaint by filing a copy of the same as an exhibit to the complaint; alleges the full compliance of that law by appellee to the date of the death of the assured, and also alleges the liability, under that law, of the assured for the support and maintenance of the appellee to the date of her death, and that thereby, the appellee, from the date of the acceptance of the assured into

defendant company as a member, until her death, had and continued to have a valuable pecuniary interest in the life of the assured; that under the laws of the defendant company, the claim of appellee was entitled to be placed in and paid from the fund secured from the pool, forming at the date of the death and accepted proofs of the same of said assured, in the months of March and April, 1894; but that appellant refused to place the same in that pool or in any other pool, and also refused to pay said loss from that pool or any other pool, although sufficient sums of money were realized by appellant from such March and April pool to pay appellee's claim in full but which it wrongfully applied to other purposes, and that appellant has wrongfully accumulated a fund of \$50,000.00 out of the assessments made against its policy holders, out of which it might and ought to pay appellee's claim, but likewise refuses to apply the same to that purpose, makes a copy of the certificate of policy a part of the complaint as an exhibit "A," containing among other conditions the following: "That this certificate shall be incontestable after one year from date as provided in the by-laws," makes a copy of the by-laws of appellant a part of the complaint by filing the same as exhibit "C;" alleges that appellee is the owner of the certificate sued on and that there is due him thereon the sum of \$3,000.00, for which he demands judgment and all other proper relief.

The policy is for a sum "not to exceed \$2,000," being dependent upon the amount realized on certain assessments. A demurrer was sustained to the first paragraph of the complaint.

To the second paragraph of the complaint appellant filed an answer in two paragraphs. The first paragraph purports to be but a partial answer to the complaint, and admits all its material allegations except

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the amount. The second paragraph of the answer is a general denial. The appellee moved for judgment against the appellant for \$2,000 on the partial answer. This motion was sustained.

Appellant appeals and assigns this ruling as error.

Appellee assigns cross error on the ruling sustaining demurrer to the first paragraph of the complaint.

The rule is that where there are two paragraphs of answer, one in confession and the other in denial the plaintiff can not treat the answer in confession as dispensing with the proof of the facts put in issue by the paragraph in denial. *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469; *Smelser v. Wayne, etc., Turnpike Co.*, 82 Ind. 417; *Weston v. Lumley*, 33 Ind. 486.

Therefore for this reason, if for no other, the court erred in sustaining appellee's motion for judgment against appellant on the first paragraph of answer.

We will next consider the cross error assigned by appellee. Counsel for appellant insist that the first paragraph of complaint is bad "because it shows on its face that appellee had no insurable interest."

The first contention of counsel for appellee is that under the poor laws of Illinois there is a legal liability resting upon the son for the maintenance of the mother, and upon the mother for the maintenance of the son, in the event the one is unable to earn a livelihood and the other be of sufficient ability to provide such support.

The Illinois statute has not been fully recited or set forth in the first paragraph of the complaint, but a copy of the statute has been filed therewith. *Wilson v. Clark*, 11 Ind. 385; *Tyler v. Kent*, 52 Ind. 583; *Swank v. Hufnagle*, 111 Ind. 453.

Assuming without deciding that the statute has

been properly pleaded, we have examined it and find that the statute is "An act to revise the law in relation to paupers," and the legal liability is created in behalf of the county or town. The only provision for enforcing it is by an action instituted either by the State's attorney or overseer of the poor. No right of action is created by the son against the mother or by the mother against the son.

The exhibits filed with the first paragraph of the complaint show that the mother was seventy-six years of age when the policy was issued, and that she was more than eighty years of age when she died. It is averred in this paragraph that at the time the policy was issued appellee "then was, and up to the date of her death, supporting, caring and providing for her maintenance."

There are no averments in the complaint tending to show any reasonable ground for an expectation of appellee of pecuniary or material benefit or advantage to him from the continuance of the life of his mother. There is nothing justifying an inference or expectation that she had or would have, in any event, sufficient ability to support him. It does not appear that appellee expected any benefit from her in the way of service, maintenance or the like. In other words it does not appear that appellee had any insurable interest in the life of his mother. *Burton v. Connecticut, etc., Ins. Co.*, 119 Ind. 207, 12 Am. St. 405.

The rule recognized in *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. St. 154, 22 Am. Rep. 741, does not prevail in Indiana. *Continental Life Ins. Co. v. Volger*, 89 Ind. 572.

It is next contended by counsel for appellee that the incontestable clause dispenses with allegation of insurable interest.

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On the back of the certificate is found the following:

"That this certificate shall be incontestable after one year from date as provided in the by-laws."

In section two of the by-laws occurs the following provision:

"Section 2. All deaths which shall occur within three years from the date of the approval of the application, upon which the certificate is issued, or from date of last revival of said certificate shall be incontestable, provided all payments have been made as required by the by-laws of the society; that no misrepresentation was made in said application, and that the death of the insured person was in no way caused by lack of proper medical attendance, or by or with the connivance of any person in any way interested in the payment of the claim."

It is alleged that all payments have been made as required by the by-laws of the society.

The position of counsel for appellee is that under the provision in the by-laws above set out, appellant is "precluded from the right to make any defense whatever to the payment of the full amount of the certificate." There is no express provision in the by-laws that the certificate shall be incontestable. Construing the clause on the back of the certificate and the provision in the by-laws together we assume, without deciding, that the certificate after one year and within three years from date of issue is incontestable.

The complaint shows that the policy was issued on the 29th of December, 1886, and that the assured died on the 2d day of January, 1894. The approval of the application upon which the certificate was issued was therefore not later than the 29th of December, 1886. It does not appear that there ever was a revival of the certificate. In other words the certificate sued on

was issued and delivered on the 29th of December, 1886, and was never thereafter, as it appears, forfeited or revived. The stipulation in the by-law is that "all deaths which occur *within* three years from the date of approval of the application upon which the certificate is issued or from the date of the last revival of said certificate *shall be incontestable*." It is not claimed that the death in this case occurred within three years from the date of the approval of the application upon which the certificate was issued or within three years from the date of the last revival of said certificate. The clause on the back of the certificate is to the effect only that it shall be incontestable after one year "as provided in the by-laws." The provision in the by-law applies only to cases where death occurs "within three years." There is no provision that where death occurs after three years the certificate shall be incontestable.

What the effect of the stipulation may be in cases where death occurs after one year and within three years from the approval of the application or revival of the certificate we need not further consider. In this case the death occurred more than seven years after the date of the approval of the application. In our opinion the court did not err in sustaining the demurrer to the first paragraph of the complaint.

Judgment reversed with instructions to overrule appellee's motion for judgment against appellant for \$2,000 on the partial answer.

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EMSHWILLER v. TYNER.

[No. 2061. Filed October 1, 1896.]

CONTRACTS.—*For Purchase of Real Estate.*—A contract for the purchase of a lot to be platted from a specified tract of real estate, the location of the lot to be determined in the future, and the method of the ascertainment pointed out, is valid, and may be enforced.

From the Blackford Circuit Court. *Reversed.*

D. H. Fouts, Aaron M. Waltz, W. H. Carroll and G. D. Dean, for appellant.

Enos Cole, Jay A. Hindman, J. A. Bonham and Elisha Pierce, for appellee.

LOTZ, J.—A demurrer was sustained to appellant's complaint in the court below, and this ruling is the error assigned in this court.

The complaint avers that the plaintiff and defendant entered into a written contract by the terms of which the plaintiff agreed to secure, locate and cause to be constructed a canning factory on a certain tract of land in Blackford county; the said canning factory to be used for the purpose of canning vegetables from year to year as the market might demand. Said factory to have a capacity for canning twenty thousand cans per day, and to employ one hundred and forty hands when in full operation; said factory to be ready to operate for the season of 1895.

In consideration of the location of the factory the defendant agreed to purchase one of seventy-four lots; which lots were thereafter to be platted out of the east part of the south half of the northwest quarter of the northeast quarter of section 10, township 23 north, of range 10 east, in Blackford County, Indiana. Also to

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purchase three shares of the paid-up, non-assessable stock of the Blackford Canning Co., said shares to be of the face value of \$25 each. And the defendant agreed to pay the plaintiff for said lot and shares of stock, the sum of \$150 in six equal payments of \$25 each, due in 6, 9, 12 and 18 months respectively, the notes given therefor to bear the date of the time when said canning factory should be organized.

It is further averred that at the time of making the contract and for a long time prior thereto, the land out of which the lots were to be platted was owned by the Hartford City Building and Paving Brick Co. and was commonly known as the White Elephant Brick Co. land; and that it was agreed and understood by the plaintiff and defendant that the lands which were to be platted were the lands known as the White Elephant Brick Company land, which lands are properly described as the south half of the northwest quarter of the northeast quarter of section 10, township 23, range 10 east, in Blackford county, being all the lands owned by the Building and Paving Company in said county. It is also averred that by the mistake of the typewriter who prepared the contract, and by the mutual mistake of the plaintiff and defendants the lands were erroneously described as first above set out. It also appears from the averments and from the copy of the contract filed with the complaint that the plaintiff's undertaking was that there should be sold seventy-four lots to be platted out of said lands, the lots to be 50 by 120 feet each. The contract also provides that the lots should be distributed or assigned to the purchaser as they might thereafter determine. It is averred that the purchasers met and distributed to the defendant the following described real estate in Blackford county, Indiana, to-wit: Lot No. 7 in Emshwiller and Adams addition to Hartford City. Being a part of

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the south half of the northwest quarter of the northeast quarter of section 10, township 23 north, of range 10 east, beginning 183.38 feet north and 1,160 feet east of the southwest corner of the above described tract, running thence north 138.9 feet; thence east 50 feet; thence south 138.9 feet; thence west 50 feet, to the place of beginning. It is further alleged that the canning company was incorporated and the factory located, and that the plaintiff fully complied with all the conditions thereof resting upon him; that he caused a warranty deed to be executed, describing the lands as last above set out, and caused the shares of stock to be issued, and that he tendered said deed and stock to the defendant and demanded compliance with said contract on his part; that the defendant refused, and he brought the deed and shares of stock into court to keep the tender good.

According to the statement of counsel the demurrer was sustained because of the insufficiency of the description of the real estate contained in the written agreement.

It is the office of a description to furnish the means of identification. In an executed contract, if the lands cannot be located from the description, the conveyance fails. It is void for uncertainty. *Peck v. Sims*, 120 Ind. 345.

The description in the contract is the east part of the south half of the northwest quarter of the northeast fourth, section 10. In the case of *Howell v. Zerbee*, 26 Ind. 214, the description was "a part of lot 3, section 36, township 33, range 4 west, containing five acres, situated in *Starke* county and the State of *Indiana*." The court said of this description: "It contains a patent ambiguity, in not defining the particular part of lot 3 intended, and there is nothing in the description by which the part intended can be ascer-

tained and rendered certain. It is therefore void for uncertainty."

In some jurisdictions it is held that a grant of a certain number of acres out of a particular tract, without designating what part, will authorize the grantee to locate it in any part of the tract. *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Walsh v. Ringer*, 2 Ohio 328, 15 Am. Dec. 555; *Hay v. Sorrs*, Wright (Ohio), 711.

But no such rule has ever prevailed in this State. Here it has been uniformly held that in an executed grant the description must be sufficient to identify and ascertain the lands or the grant fails. *Porter v. Byrne*, 10 Ind. 146, 71 Am. Dec. 305; *Jolly v. Ghering*, 40 Ind. 139; *City of Crawfordsville v. Irwin*, 46 Ind. 438.

It will be observed that the contract in the case at bar is not a grant. It is only an agreement to convey in the future. It is not executed in compliance with the requirements of the statute for the conveyance of the title to real estate.

It is settled that if the contract be to convey a certain number of acres out of another larger tract, the location of the grant to be determined in the future and the method of the ascertainment pointed out, the contract is valid and may be enforced. *Carpenter v. Lockhart*, 1 Ind. 434; *Washburn v. Fletcher*, 42 Wis. 152; *Cheney v. Cook*, 7 Wis. 357.

But if it be conceded that the description in the contract be defective it is shown by the averments that the ambiguity and uncertainty was removed by the subsequent acts of the parties. It is alleged that the plaintiff and the purchasers of the lots (which includes the defendant) met and distributed or assigned a certain definitely described parcel of land to the defendant, and the plaintiff offered to convey such tract to the defendant. That which was uncertain has been

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rendered certain by the acts of the parties themselves, and that, too, in pursuance of the contract. This conduct is an exposition of the contract by the parties themselves, and they best knew what their intention was, and what they believed their contract to mean. *Louisville, etc., R. W. Co. v. Reynolds*, 118 Ind. 170.

The appellee insists that the contract is void as against public policy for the reason that the property was to be distributed by a lottery, and cites *Lynch v. Rosenthal*, 144 Ind. 86. But there is nothing in the contract or in the averments that shows that the lots were of unequal value or that they were parceled out by lot.

The complaint is sufficient.

Judgment reversed, with instructions to overrule the demurrer to it.

THE STATE v. CLERK ET AL.

[No. 2,132. Filed October 1, 1896.]

BAIL.—Quashing Indictment.—By the quashing of an indictment, and the discharge of the defendant, the recognizance bond becomes inoperative and void, and is not revived by the filing of an affidavit and information against him on the same charge during the same term of court.

From the Sullivan Circuit Court. *Affirmed.*

W. A. Ketcham, Attorney-General, C. D. Hunt, Prosecuting Attorney, and W. H. Bridwell, for State.

G. W. Buff, W. R. Nesbit, A. D. Leach and J. S. Bays, for appellees.

Ross, J.—This was an action brought in the name of the State against the appellees upon a recognizance bond.

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Counsel are apparently agreed upon the facts, which are in substance as follows: The grand jury impaneled, at the March term, 1895, of the Sullivan Circuit Court, indicted the appellee, Harry Clerk, for perjury, and he was arrested during that term of the court and executed a recognizance bond, with his co-appellee, R. D. Clerk, as surety thereon. At the succeeding, or May term of the Sullivan Circuit Court, the indictment was quashed and the accused discharged. Subsequently, and during the same term of the court, an affidavit and information was filed charging the appellee, Harry Clerk, with the same offense with which he was charged in the indictment which had been quashed. No arrest was made under the affidavit and information, neither did the accused appear or plead thereto, but the case was set down for trial on a future day, and when the day for trial arrived, the accused not appearing, the court declared the recognizance bond, given when he was arrested under the indictment, as forfeited, and this action was brought to recover the penalty of the bond under the order of forfeiture. The demurrer to the cross-complaint admits these facts to be true.

When the indictment was quashed and the defendant discharged, the recognizance bond was canceled and became inoperative and void. The filing of the affidavit and information was the commencement of a new action, requiring the rearrest of the accused. By the quashing of the indictment the charge against the defendant was withdrawn, and the court having discharged the accused, no subsequent proceeding on the part of the State by making a new charge could rehabilitate and make effective the recognizance bond which was canceled and became inoperative and void when the prisoner was discharged.

The assumption of appellant's counsel that the

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quashing of the indictment and discharge of the prisoner by the court did not relieve the accused from future attendance upon the court, or cancel and destroy the validity and effectiveness of the recognizance bond, is wholly untenable.

The facts alleged in the cross-complaint, if true, were sufficient to entitle the appellees to the relief prayed for.

The judgment of the court below is affirmed.

THE BALTIMORE AND OHIO RAILROAD COMPANY v.
COUNTRYMAN, ASSIGNEE, ETC.

[No. 1,913. Filed May 26, 1896. Rehearing denied October 1, 1896.]

PLEADING.—*Damages Caused by Fire.—Complaint.*—In an action against a railroad company for damages to real estate caused by fire set out on its right of way, and permitted to escape to said land, it is not necessary to aver what engine started the fire. *p. 140.*

BILL OF EXCEPTIONS.—*Motion to Make More Specific.—Record.*—In order to present any question upon the overruling of a motion to make more specific, it must be brought into the record by bill of exceptions or special order; if time is given beyond the term to file same, the fact must appear from the record outside of the bill. *p. 140.*

APPEAL AND ERROR.—*Bill of Exceptions.—Motion for New Trial.*—The time allowed for filing a bill of exceptions upon the overruling of a motion for a new trial covers only matters relating to the trial, and does not include collateral motions, such as to make more specific, made and overruled before issues closed, and which do not constitute causes for new trial. *p. 140.*

PLEADING.—*Damages Caused by Fire Escaping from Railroad Right of Way.—Complaint.*—Where in an action against a railroad company for damages caused by fire escaping from the company's right of way, the complaint clearly proceeds upon the theory that the claim first accrued to the plaintiff's assignor and passed to plaintiff, by assignment, the unnecessary statement at the conclusion of the pleading, that thereby the "plaintiff has been damaged," cannot be given such force as to require the complaint to be construed as counting upon an injury to the land while its title was in the assignee. *p. 141.*

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ASSIGNMENTS.—*Right of Action for Damages Caused by Fire Escaping from Railroad Right of Way is Assignable.*—The right of action against a railroad company for damages caused by fire escaping from the railroad company's right of way is assignable. *p. 141.*

DAMAGES.—*Measure of, in Action Caused by Fire Escaping from Railroad Right of Way.*—The measure of damages in an action against a railroad company for negligently permitting fire to escape from its right of way to adjoining land is the difference in values of the land immediately before and after the fire. *p. 142.*

PRACTICE.—The withdrawal of evidence with direction to disregard it cures any error in its admission. *p. 143.*

From the DeKalb Circuit Court. *Affirmed.*

J. H. Collins, J. E. Rose, F. E. Baker and Chas. W. Miller, for appellant.

Harris & Cameron, Roby, Shuman & Link, for appellee.

GAVIN, J.—Appellee, as assignee of one Hart, sued appellant to recover for damages to real estate and personal property caused by fire, set out on its right of way and permitted to escape to said land by its negligence on a certain day. The motion to make the complaint more specific by averring what engine started the fire was properly overruled, especially in view of the averment of the pleader that he could not so do. *Ohio, etc., R. W. Co. v. Trapp*, 4 Ind. App. 69.

In order to present any question upon the overruling of a motion to make more specific, it must be brought into the record by bill of exceptions or special order. *Lake Erie, etc., R. R. Co. v. Clark*, 7 Ind. App. 155.

If time is given beyond the term to file the same this fact must appear from the record outside of the bill. *DePauw University v. Smith*, 11 Ind. App. 313.

The time allowed upon the overruling of the motion for a new trial covers only matter relating to the trial and does not include collateral motions, such as to make more specific, made and overruled before is-

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sues closed and which do not constitute causes for new trial. Burns' R. S. 1894, section 638 (626, R. S. 1881).

The complaint very clearly proceeds upon the theory that the claim first accrued to Hart and then passed by assignment to appellee. The damage to the land while owned by Hart is distinctly alleged. A cause of action thereby arose in his favor. It is also averred that by his general assignment he transferred to the assignee all claims and demands of every description. The unnecessary statement at the conclusion of the pleading that thereby the "plaintiff has been damaged" cannot be given such force as to cause us to construe the complaint as counting upon an injury to the land while its title was in the assignee.

The cause of action being for injury to property was such as would have survived the death of Hart and would have passed to his legal representatives. *Pittsburg, etc., R. W. Co. v. Swinney, Exx.* 97 Ind. 586. It was consequently assignable. *Patterson v. Crawford*, 12 Ind. 241; *Griffin v. Wilcox*, 21 Ind. 370; *Chicago, etc., R. W. Co. v. Wolcott*, 141 Ind. 267; *Fried v. New York, etc., R. R. Co.*, 25 How. Pr. 285; *Cincinnati v. Hafer*, 49 Ohio St. 60; *Pomeroy's Code Rem.*, sections 147, 148.

Counsel argue the insufficiency of the evidence upon the apparent supposition that the only negligence charged and in issue was with reference to starting the fire. It is, however, directly averred in the complaint that the defendant "negligently permitted the fire, ignited on its said right of way, to escape therefrom and spread through and upon the plaintiff's assignor's said lands," etc.

That railroad companies must answer to those free from contributory negligence for damages resulting from their negligently permitting fires to escape from

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their right of way cannot be gainsaid. *Cleveland, etc., R. W. Co. v. Hadley*, 12 Ind App. 516; *Louisville, etc., R. W. Co. v. Palmer*, 13 Ind. App. 161; *Lake Erie, etc., R. W. Co. v. Clark, supra*.

While there is a conflict as to where the fire originated, the evidence was sufficient to support the verdict upon the ground of negligent escape. *Terre Haute, etc., R. R. Co. v. Walsh*, 11 Ind. App. 13; *Chicago, etc., R. R. Co. v. Williams*, 131 Ind. 30.

The first instruction given authorizes the jury to find the appellant liable if it negligently suffered dry grass and other combustible materials to accumulate and be along and upon its right of way adjoining Hart's land, and negligently set fire thereto, and negligently suffered such fire to escape upon and to the Hart land, provided appellee and his assignor were themselves without fault in the premises. It is objected to this instruction that it submits to the jury the question of appellant's negligently setting out the fire, of which fact it is claimed there is no evidence. It is sufficient to say that since under the authorities above referred to it was wholly unnecessary for appellee to prove the fire to have been negligently started by appellant, it has no cause for complaint of an instruction which imposed upon appellee this unnecessary burden. The measure of damages as to the real estate was correctly declared by the trial court to be the difference in values of the land immediately before and after the fire. *Terre Haute, etc., R. R. Co. v. Walsh, supra*; *Chicago, etc., R. R. Co. v. Kern*, 9 Ind. App. 505; *Chicago, etc., R. R. Co. v. Smith*, 6 Ind. App. 262.

Had it appeared that some other factor had intervened during the fire to affect the value of the land, then, doubtless, such factor should have been expressly excluded; but our attention has not been

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called to the existence of anything of this kind. A cause for new trial, assigning that the court erred in giving instructions from one to nine inclusive, does not test the correctness of each instruction severally. To sustain the cause it must appear that all are bad. *Rees v. Blackwell*, 6 Ind. App. 506; *Ohio, etc., R. W. Co. v. McCartney*, 121 Ind. 385.

The objections to the introduction of the assignments, and statutes of Ohio, are not well taken. As we construe it the complaint avers transfer of the cause of action sued on, and the assignments upon their face purport to convey it although it is true they do not mention this specific claim. The general language used, however, includes it.

The evidence of Warner, of which complaint is made, was withdrawn and the jury plainly directed to disregard it. This cured the error in its original admission, if any there was. *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Zehner v. Kepler*, 16 Ind. 290.

Counsel have not indicated nor have we found anywhere in the record any proper presentation of any question upon instructions asked. The statement in the motion for new trial that the court refused such an instruction does not establish the fact. *Ahlendorf v. First Natl. Bank*, 6 Ind. App. 316.

We find in the record no cause for reversal. Judgment affirmed.

THE BEDFORD BELT RAILWAY COMPANY v.
WINSTANDLEY ET AL.

[No. 1,997. Filed June 16, 1896. Rehearing denied October 1, 1896].

CONTRACT.—*Land Purchased to be Held in Trust for Another.—Parol Agreement.—Statute of Frauds.*—B, a railroad company, made an oral agreement with W by which W purchased, to be held for B, a tract of real estate, for a consideration of \$5,000. B advanced a payment of \$2,500, and the real estate was conveyed by

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warranty deed to W. who executed a mortgage for balance of purchase money which B verbally agreed to pay. B failed to pay off said mortgage when due, and the same was foreclosed and a personal judgment rendered against W. The lands did not sell on foreclosure sale for enough to satisfy the judgment, and W was compelled to pay the deficiency remaining after sale of the lands. *Held*, in an action by W against B to recover the amount of the deficiency paid by him, that B's promise to pay the remainder of the purchase price was not an attempt to create a trust or convey an interest in land by parol, nor was it a promise to pay the debt of another.

From the Monroe Circuit Court. *Affirmed.*

F. M. Trissal, for appellant.

John D. Alexander, for appellees.

LOTZ, J.—The facts of this case are substantially as follows:

In 1893 the appellee, Jesse M. Winstandley, purchased of Martin and Michael O'Brien certain lots or parcels of land in the City of Bedford for the sum of \$5,000.00. He paid \$2,500.00 cash and gave his note for \$2,500.00 and secured the same by a mortgage on the land, the mortgage being executed by himself and wife. The O'Briens conveyed the land to him by warranty deed. He was induced to take such conveyance and to execute the note and mortgage by the officers of the appellant and the \$2,500.00 cash payment was made with the money of appellant furnished the appellee for that purpose. Winstandley held the title of said land in trust for the appellant, and the appellant agreed to pay the remainder of the purchase money. Winstandley and wife subsequently, at the request of the officers and agents of the appellant, by quit claim conveyed the realty to one Hatch, another agent of the appellant, and the title was taken and held for appellant. Subsequently the mortgage to the O'Briens became due and they brought suit and ob-

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tained a decree of foreclosure of the same, and a personal judgment against the appellee. The lands were sold by the sheriff to satisfy the decree. The lands did not sell for enough to satisfy the judgment and the sheriff then levied upon the other property of the appellee on the personal judgment rendered against him, and he was compelled to pay the remainder in amount, about \$700.00.

In the action brought by the O'Briens, the appellee and his wife filed a cross-complaint and had the appellant made a defendant thereto. Before the issues were joined and tried on the cross-complaint, the O'Briens recovered a judgment of foreclosure and exhausted the land and the appellee satisfied the remainder. The appellee and his wife then filed a supplemental complaint and asked for a judgment against the appellant. The issues on the cross-complaint were tried by the court and a special finding made upon which the court stated conclusions of law and rendered judgment in favor of the appellee, Jesse M. Winstandley, only.

It is insisted that the promise declared on is void because (1) it is an attempt to create a trust in real estate by parol; (2) it is an attempt to convey an interest in real estate by parol; and (3) it is a promise to answer for the debt, default or miscarriage of another, and is not in writing signed by the party to be bound thereby.

These questions arise upon demurrer to the cross-complaint; upon exceptions to the conclusions of law, and upon the motion for a new trial.

Neither of these contentions is well taken. The appellant has the title to the realty held in trust for it by its agent Hatch. Its money went into the purchase thereof and a resulting trust arises in its favor which

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it can enforce. The promise made to the appellee is not within the statute of frauds. It is not a promise to answer for the debt, default or miscarriage of another, but is a direct and original undertaking made by the appellant to the appellee.

The appellee has been compelled to pay a part of the purchase money of appellant's real estate, and for such payment the appellee has received nothing. The appellant in good conscience and equity should be compelled to reimburse him.

Several other minor objections are made to the proceedings in the court below; but it is a well established rule that when the ultimate judgment is right no intervening errors will avail in securing a reversal.

Judgment affirmed.

REATH ET AL. v. THE STATE, EX REL. JOHNSON.

[No. 1,966. Filed October 2, 1896.]

INTOXICATING LIQUORS.—*Damages Resulting from Illegal Sale to Minor.*—*Liability of Bondsmen.*—The liability of the bondsmen of a saloonkeeper for damages resulting from illegal sales of liquor to a minor is not affected by the fact that the sales were made by the bartender and not by the saloonkeeper in person.

SAME.—*Damages Resulting from Illegal Sales to Minor.*—*Statute Construed.*—Under section 7288, Burns' R. S. 1894, providing that saloonkeepers shall be liable upon their bonds "to any person who shall sustain any injury or damage to his person or property, or means of support, on account of the use of such liquors, so sold," the loss of services of a minor son who contributed by his earnings to the support of his father's family is a damage within the meaning of the statute, although the earnings and income of the father is sufficient to keep the family from becoming dependent.

From the Lawrence Circuit Court. *Affirmed.* •

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M. F. Dunn, S. B. Lowe and W. H. Martin, for appellants.

J. E. Boruff, T. J. Brooks and W. F. Brooks, for appellee.

GAVIN, J.—Appellant Reath was a licensed saloon-keeper. Appellee sued him and his co-appellants upon their bond to recover for the loss of services of his minor son who was killed by other minors while intoxicated by means of liquors sold them by Reath in violation of law, it being averred that the death of the child and the consequent loss of services were caused by such unlawful sales.

The complaint was sufficient to withstand the demurrer. It satisfactorily appears from the various averments that some, at least, of the sales were unlawful.

Our statute, section 7288, Burns' R. S. 1894 (5323, Horner's R. S. 1896), provides that licensed saloon-keepers shall be liable upon their bonds "to any person who shall sustain any injury or damage to his person or property, or means of support on account of the use of such intoxicating liquors, so sold as aforesaid" in violation of the provision of that act.

We have heretofore decided that such liability exists even though the sale may not have been made by the principal defendant in person, but by a clerk or agent authorized to make sales generally and to conduct the business. *Boos v. State, ex rel.*, 11 Ind. App. 257. The adjudications in other states are in accord with ours. *George v. Gobey*, 128 Mass. 289; *Worley v. Spurgeon*, 38 Iowa 465; *Kehrig v. Peters*, 41 Mich. 475, 2 N. W. 801; *Keedy v. Howe*, 72 Ill. 133; *Commonwealth v. Briant*, 142 Mass. 463, 8 N. E. 338; *Kreiter v. Nichols*, 28 Mich. 496; *Gullickson v. Gjorud*,

89 Mich. 8, 50 N. W. 751; Black on Int. Liq., section 298.

The bondsmen are not therefore relieved by the fact that the sale was made by the bartender and not by Reath himself.

The appellant who had a wife and family was earning \$45.00 per month and received also \$10.00 per month pension. Both before and after the death of the son the father applied his earnings to the support of the family and paid the dues on \$900.00 building association mortgage upon the home worth \$1,000.00. The boy besides doing work enough for his father to pay for his board, provided his own clothes and contributed about \$50.00 per year to the support of the family. His mother says he gave some to her each week and she used it to pay household expenses. Counsel for appellants insist that appellant was not, by the loss of his son, damaged in his "means of support" because after his death he still had an income of \$55.00 per month which was sufficient for the support of himself and family; they contend that it must appear that appellant was by the loss of his son's support "reduced to a state of pecuniary dependence."

We pass by the objections made to the manner of the presentation of this question and also pass by the consideration of the question of whether or not appellant would be entitled to recover the value of the son's services under the clause of the statute giving compensation for injury to property, the son being a minor and the father entitled by law to his services. We confine ourselves, as do counsel, to one proposition, that, under such circumstances as we have given, the appellant suffered no injury to his means of support. Counsel refer to and rely upon *Volans v. Owen*, 74 N. Y. 526, which does to some extent perhaps appear to sustain their position. We cannot, however,

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agree to their contention. It is evident from a late case that that court does not adopt appellants' construction of this case, for it says: "The injury to the means of support was one of the main grounds of the action, and when the party is deprived of the usual means of maintenance, * * * the action can be maintained." *Mead v. Stratton*, 87 N. Y. 493.

Here the law gave to appellant the earnings of the son until he became twenty-one. The father had just as much right to rely upon them as upon his own exertions. These earnings of the son did go into the family fund and either lightened the burden placed upon the father or enabled him the better to support himself and family. The father's capacity to earn money was, of course, liable to be diminished at any time. He had a legal right to rely to some extent upon the future earnings of the son until he should arrive at his majority. They were a means of support upon which he had both a moral and a legal right to depend, and when this means was taken away he was entitled to recover for its loss. "Support" is necessarily a flexible term. The requisite means of support varies largely with different families, and varies often at times with the same families because they are compelled to make the character of the support harmonize with the amount of means available therefor.

There may be material injury to means of support without deprivation of the actual necessities of life or a reduction to a state of dependence. A man has a right to expect and obtain for himself and family not only the necessities but the comforts of life. We are certainly not prepared to say, as a matter of law, that where a family has enjoyed an income of \$55.00 per month and \$50.00 per year in addition thereto, part of it being applied to paying for a home, there

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was no loss or deprivation of comfort occasioned by taking away the \$50.00.

Under the evidence and the authorities the verdict was right. *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403; *Schneider v. Hosier*, 21 Ohio St. 98; *Herring v. Ervin*, 48 Ill. App. 369; *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027; *Thill v. Pohlman*, 76 Ia. 638, 41 N. W. 385; *Hackett v. Smelsley*, 77 Ill. 109; *Moran v. Goodwin*, 130 Mass. 158.

Judgment affirmed.

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[No. 2,076. Filed October 2, 1896.]

TRESPASS.—*Venue.*—An action of trespass for an injury to real estate must be brought in the county where the real estate is situated.

APPEAL.—*Pleading.*—*Answer.*—*Demurrer.*—An order overruling a demurrer to a bad answer will not be disturbed on appeal where the complaint is also bad.

From the Whitley Circuit Court. *Affirmed.*

Benjamin Ninde, S. F. Swayne, J. S. Collins and B. E. Gates, for appellants.

T. R. Marshall, W. F. McNaghy and P. H. Clugston, for appellees.

DAVIS, C. J.—This action was instituted by appellants against appellees in Whitley county to recover damages for injuries by way of trespass to real estate in Allen county.

The only errors assigned seek to bring in review the action of the trial court in overruling the demurrer of appellants' to appellees' answers.

It is well settled that an action of trespass for an

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injury to real estate must be brought in the county where the real estate is situated. *Keaton v. Snider*, 14 Ind. App. 66; *Kinser v. Dewitt*, 7 Ind. App. 597; *DeBreuil v. Pennsylvania Co.*, 130 Ind. 137.

The complaint was bad and the demurrer filed thereto by appellees on the ground that the Whitley Circuit Court had no jurisdiction of the subject matter of the action should have been sustained. Whether the answer was good or bad is immaterial because a bad answer is good enough for a bad complaint and the demurrer to the answer should have been carried back and sustained to the complaint. *McDonald v. Geisendorff*, 128 Ind. 153; *Indiana Live Stock Ins. Co. v. Bogeman*, 4 Ind. App. 237; *Gould v. Steyer*, 75 Ind. 50.

It is true that where a defendant's answer is held good on demurrer he cannot successfully urge on appeal, as a cause for reversal, that the court erred in not carrying the demurrer back to the complaint. *Gilbert v. Bakes*, 106 Ind. 558. Where, however, the plaintiff appeals and urges as a reason for reversal that the court erred in overruling his demurrer to the answer, the defendant has a right to show if he can that such ruling is not cause for reversal, because of the insufficiency of the complaint.

Judgment affirmed.

**TOWN OF PETERSBURG v. PETERSBURG ELECTRIC LIGHT,
POWER AND WATER WORKS COMPANY.**

[No. 2,185. Filed October 2, 1896.]

PLEADING.—Action Against a Town.—Complaint.—A complaint against a town alleging that pursuant to a contract the plaintiff furnished such town with electric lights for which said town owed plaintiff a certain sum which was due and unpaid, is sufficient to

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withstand a demurrer without alleging that the amount due under the contract had been allowed by the town board; that there was funds in the hands of the town treasurer with which to pay the claim; or, that said town could have paid said indebtedness at any time prior to the commencement of the action.

APPEAL.—*Joint Assignment of Error.*—A specification of error that “the court erred in sustaining the demurrer of the appellee to the third, fourth, fifth, sixth and eighth paragraphs of appellant’s answer,” is a joint assignment and must fail if any one of the paragraphs is bad.

SAME.—*Failure to Discuss Error.*—*Waiver.*—An assignment of error that is not discussed will be deemed to have been waived.

From the Pike Circuit Court. *Affirmed.*

G. B. Ashby, for appellant.

E. P. Richardson and *A. H. Taylor*, for appellee.

ROSS, J.—This was an action to recover a sum alleged to be due under the terms of a written contract for electric lights furnished appellant by the appellee.

The appellant insists that the court erred in overruling its demurrer to the complaint, for the reason that there is no allegation in the complaint either that the amounts due under the terms of the contract sued on had not been allowed by the board of trustees of such town; that there were funds in the hands of the town treasurer with which to pay the same; or that appellant could have paid said indebtedness at any time before this action was commenced.

It is alleged in the complaint that under the terms of the contract the appellee furnished the appellant with lights, for which the appellant owed appellee a certain sum which was due and unpaid. The demurrer admits the truth of these allegations. If appellant had paid appellee or there was any legal reason why it should not or could not pay appellee, it should have interposed the same by way of defense. The appellee

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was not bound to anticipate and avoid any defense which appellant might have.

We think the allegations with reference to the making of the contract, the furnishing of the light, and that the amount agreed upon therefor is due and unpaid, are sufficient, and that the complaint is sufficient to withstand the demurrer thereto.

The second specification of error is that, "the court erred in sustaining the demurrer of the appellee to the third, fourth, fifth, sixth, and eighth paragraphs of appellant's answer." This specification of error is joint and presents for our consideration the correctness of the ruling of the trial court as to all of these paragraphs of answer jointly, and not as to the rulings upon each of them separately. If any one of the paragraphs was bad this specification must fail. *Moore v. Orr*, 10 Ind. App. 89; *Supreme Council, etc., v. Boyle*, 10 Ind. App. 301; *Crist v. Jacoby*, 10 Ind. App. 688; *Houk v. Hicks*, 11 Ind. App. 190; *Eddingfield v. State, ex rel.*, 12 Ind. App. 312; *Saunders, Treas., v. Montgomery*, 143 Ind. 185, and cases cited; *Globe Accident Ins. Co. v. Helwig*, 13 Ind. App. 539.

Counsel for appellant in argument of the questions urged for consideration on this appeal, does not insist that both the third and fourth paragraphs of appellant's answer states a good defense to the appellee's cause of action. He does very earnestly insist that either the fifth, sixth, or eighth paragraphs of the answer are sufficient, but without examining or considering into their sufficiency we are compelled to hold that inasmuch as the other paragraphs were bad, the second specification of error is not sustained. This court assumes that the rulings of the trial court were right, casting the burden upon the complaining party to show by the record that the rulings were erroneous and harmful. Counsel do not pre-

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tend to show by argument, or to produce any authorities to sustain the fifth, sixth, and eighth paragraphs of the answer. The failure of counsel to discuss the sufficiency of the fifth, sixth, and eighth paragraphs of the answer amounts to an admission that they are insufficient. *The Globe Accident Ins. Co. v. Helwig, supra.*

Judgment affirmed.

GEMMILL v. THE STATE, EX REL. BROWN.

[No. 1,942. Filed April 23, 1896. Rehearing denied October 2, 1896.]

BASTARDY.—Evidence.—Engagement to Marry.—Evidence of an engagement to marry between the accused and the relatrix in a bastardy proceeding, is admissible to show the relation upon which they stood to each other. *p. 155.*

SAME.—Evidence.—Evidence of the time and frequency of acts of sexual intercourse occurring near the time of conception, between the accused and relatrix in a bastardy proceeding, is admissible where the accused has admitted having sexual intercourse within a short time thereafter, but denies the particular act resulting in conception. *p. 155.*

SAME.—Evidence.—Cross-Examination of Defendant.—Letters.—It is not error to permit the defendant in a bastardy proceeding to be asked on cross-examination if he wrote certain extracts from letters which were read by counsel for relatrix, such extracts containing statements contradictory to his testimony in chief, and not being garbled or wrested from their proper meaning, the entire letters having been subsequently offered and read in evidence. *p. 156.*

WITNESS.—Cross-Examination, Scope Of.—When on direct examination a general subject is opened up, the cross-examination is not confined to matters particularly brought by the original examination, but may extend to any and all phases of that subject. *p. 158.*

SAME.—Impeachment.—A witness who had lived for many years in a neighborhood from which he had moved four months before giving his testimony, may be impeached by showing his reputation in such neighborhood. *pp. 158, 159.*

APPEAL.—Bill of Exceptions.—Record.—When time is given beyond the term to file a bill of exceptions, this fact must appear from the record by order-book entry, and not by statement in the bill of exceptions. *p. 159.*

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From the Delaware Circuit Court. *Affirmed.*

J. W. Headington, J. F. LaFollette, O. H. Adair, J. J. M. LaFollette, J. W. Ryan and Wm. A. Thompson, for appellant.

J. N. Templer, E. R. Templer, W. H. Williamson and Joseph Sells, for appellees.

GAVIN, C. J.—Appellant was adjudged the father of the bastard child of relatrix, but asserts he is entitled to a new trial.

There was no error in admitting proof of an existing engagement to marry between appellant and relatrix. It was said by Olds, J., in *Ramey v. State, ex rel.*, 127 Ind. 243: "It was proper to show the relations existing between these parties, their acquaintance and their intimacy of whatever character it was." Such evidence is admitted, not because it has any direct tendency to prove illicit intercourse between the parties, but simply because it is an incidental circumstance to inform the jury of the footing upon which they stand toward each other. *Marks v. State, ex rel.*, 101 Ind. 353; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1024.

Relatrix testified that the child was begotten about March 1. Appellant denied having intercourse with her at that time, but admitted that he did so, for the first time, upon April 6 following. Complaint is made because the court required him to answer as to when and how frequently he had such intercourse after that time. While the court held this question proper, and it was asked repeatedly, we have been unable to find any answer which indicated to the jury either when or how frequently this occurred. Even had it been directly answered we are unable to see how appellant could have been harmed thereby. The circumstances surrounding appellant and relatrix, their outward

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relations and their opportunities for intimacy, were about the same for months previous to April 6, and for some time afterward as at that time. His admission that he was disposed to engage in this commerce during a period so near to the time of conception would have some weight to corroborate the girl's testimony that he was of the same mind shortly before. *Thayer v. Thayer*, 101 Mass. 111, quoted with approval in *State v. Markins*, 95 Ind. 464; *Beers v. Jackman*, 103 Mass. 192.

Exception is taken to the court's permitting parts of certain letters to be read to appellant while on the stand and in allowing him to be asked "Did you write that language in that letter?" Counsel insist that it was not proper to thus put the letters to the jury by piecemeal, nor to allow a cross-examination based upon the contents of these letters, and that they did not respond to anything brought out upon the original examination. At section 463, 1 Greenleaf Ev., it is said that on cross-examination counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. Again at section 465 it is further stated: "A witness cannot be asked upon cross-examination, *whether he has written such a thing*, stating its particular nature or purport, the proper course being to put the writing into his hands, and to ask him whether it is his writing." This rule, which has been abrogated by statute in England, was founded upon the decision of the Law Judges in the Queen's Case, 2 Brod. and Bing. *286, and has been approved in this country so far as it defines the nature of the question

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to be asked. *Stamper v. Griffin*, 12 Ga. 540; *Romertze v. East River Nat'l Bank*, 49 N. Y. 577; *Rapalje on Witnesses*, sections 205, 206. It has also been accepted in Indiana. *McCullough v. McCullough*, 12 Ind. 487.

While this is laid down as the ordinary course of procedure, yet the original opinion given by the judge to the house of lords, Greenleaf, Rapalje, and the New York Court of Appeals recognize that, while the cross-examiner should ordinarily first make known to the jury the contents of the letter when he offers it on his side of the case, the trial court will, upon proper statement of the necessity therefor, in the furtherance of justice, permit the letter, if otherwise competent, to be read immediately and pending the cross-examination that questions may be asked founded upon it. Here the letters were submitted to appellant before he was interrogated concerning them and he admitted writing them. Counsel have not pointed out nor have we observed any respect wherein the extracts as to which he was particularly questioned, were, in fact, garbled, incomplete, or wrested from their proper connection so as to convey any false impression as to their meaning. The entire letters were subsequently offered and read in evidence. Under these circumstances appellant was not subjected to any unfair treatment, nor was there any possibility of material wrong resulting to him from the mode of examination pursued.

Under the above authorities and *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 415, there was no error in permitting appellant to be questioned as to certain matters referred to in the letters.

From the statements upon the stand and the letters considered in connection therewith, the jury might well have concluded that appellant's present version of the facts was not in harmony with the real truth.

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It is true, as stated by some of the authorities cited by appellant, the cross-examination must be limited to the subject-matter of the original examination. *Hunsinger v. Hofer*, 110 Ind. 391; *Johnson v. Wiley*, 74 Ind. 233; *Toledo, etc., R. W. Co. v. Harris*, 49 Ind. 119.

This does not mean, however, that on cross-examination no questions may be asked save as to matters particularly brought out by the original examination. On the contrary when a general subject is opened up, the cross-examination may extend to any and all phases of that subject. *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544. *Vogel v. Harris*, 112 Ind. 494.

Appellant had denied the paternity of the child and the particular act of intercourse by which it came into being. His subsequent conduct and statements as exemplified in portions at least of these letters were to some extent inconsistent with such denial. So far as there was in them anything which could even remotely affect the case they were in a greater or less degree antagonistic to appellant's theory of the facts. They were therefore properly admitted in evidence.

The trial was had May 22, 1895. There was evidence that one Joe Gemmill had been raised and lived many years in the neighborhood where appellant lived, but had gone to Chicago in the winter of 1894-5, three or four months before the trial. This Joe Gemmill was a witness for appellant, his deposition having been taken May 8, 1895. He was properly impeached by proof of his bad character in the neighborhood where he had lived so many years. While evidence of character goes to fix the credibility of the witness at the time he testifies, the proof cannot be limited to that particular day, but may extend back for a reasonable period of time, its weight being dependent upon the proximity in time and the other circumstances of the

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case. It is very manifest that no ordinary man would in a city like Chicago establish any general reputation either good or bad within three or four months. Were there not a reasonable margin of time over which the investigation might extend, the witness might by a recent removal make evidence which was really wholly worthless, unimpeachable. The case in hand shows an extreme instance of the possibility of such a wrong were we to adopt the rule asserted by appellant. It is true that there are sentences and statements in cases cited by appellant which, when literally construed, sustain more or less appellant's position. *City of Aurora v. Cobb*, 21 Ind. 492; *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472; *Rawles v. State, ex rel.*, 56 Ind. 433; *Meyncke v. State, ex rel.*, 68 Ind. 401.

Later authorities, however, establish the doctrine which we have declared, both in our State and elsewhere. *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43; *Pape v. Wright*, 116 Ind. 502; *Keyes v. State*; 122 Ind. 527; *Brown v. Luehrs*, 1 Ill. App. 74; *Blackburn v. Mann*, 85 Ill. 222; *State v. Lanier*, 79 N. C. 622; *Keator v. People*, 32 Mich. 484; *Watkins v. State*, 82 Ga. 231, 8 S. E. 875; *Holliday v. Cohen*, 34 Ark. 707; *Kelly v. State*, 61 Ala. 19; *Commonwealth v. Billings*, 97 Mass. 405.

The question on character, as to the exclusion of which appellant complains, was clearly directed, not to developing the character of Gemmill, the witness attacked, but was really an assault upon that of relatrix. It was properly ruled out.

When time is given beyond the term to file a bill of exceptions, this fact must appear from the record by order-book entry, and not by statement in the bill of exceptions. *Benson v. Baldwin*, 108 Ind. 106; *Engleman v. Arnold*, 118 Ind. 81; *DePauw University v.*

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Smith, 11 Ind. App. 313; *Elliott's App. Proced.*, section 801.

Our conclusion is that no just cause for reversal exists.

Judgment affirmed.

LOTZ, J., did not participate.

AETNA INSURANCE COMPANY v. STROUT.

[No. 1,680. Filed October 18, 1896.]

INSURANCE.—Action on Policy.—Complaint.—A complaint in an action on an insurance policy is not bad for a failure to directly aver the consideration and time of expiration of the policy, where the policy itself is made a proper exhibit. *p. 161.*

SAME.—Proof of Loss.—Waiver.—A denial by an insurance company of all liability on an insurance policy, operates as a waiver of the requirement for proof of loss. *p. 161.*

SAME.—Construction of Policy.—Where an insurance policy is so drawn as to be fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the insured. *p. 162.*

SAME.—Construction of Policy.—A policy of insurance covering a certain specified building, a boiler and engine "while contained in above described building," and certain machinery, tools, and patterns, covers the patterns insured even though they were not in the building at the time they were burned. *p. 162.*

SAME.—Parol Evidence.—In an action on a fire insurance policy, parol evidence is admissible to identify the property covered. *p. 163.*

APPEAL AND ERROR.—Evidence.—Objections to the admission of evidence, not stated at the time it was objected to, cannot be urged on appeal. *p. 163.*

INSURANCE.—Evidence.—In an action on an insurance policy, where a greater loss is proved than was at first claimed, the insured may explain the discrepancy by showing that his first claim was made through a misunderstanding as to the construction of the policy. *p. 164.*

From the Lawrence Circuit Court. *Affirmed.*

Newton Crooke, F. A. Crooke, S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

J. H. Willard, for appellee.

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GAVIN, J.—Appellee recovered judgment for the value of certain patterns destroyed by fire and covered by an insurance policy issued by appellant.

The complaint was not bad for the want of a direct averment of the consideration and time of expiration of the policy. The policy itself was made a proper exhibit and supplied both these facts. *Jaqua v. Woodbury*, 3 Ind. App. 289; *Reynolds v. Baldwin*, 93 Ind. 57.

The complaint alleged that after notice the company's agent and adjuster investigated the circumstances attending the loss, and the "defendant" then denied all liability "to plaintiff on account of said loss and refused to pay the same, or any part thereof, and informed plaintiff that she could not make any proof of loss for the same," by reason whereof no proofs were made. Such a denial of liability operates as a waiver of the proofs. *Continental Ins. Co. v. Chew*; 11 Ind. App. 330; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 20 L. R. A. 400; *Commercial, etc., Assurance Co. v. State, ex rel.*, 113 Ind. 331.

The principal question in the case arises upon the construction of that part of the policy which describes the property. The policy reads: "To an amount not exceeding two thousand dollars (\$2,000.00) on the following described property while located and contained as described herein and not elsewhere, to-wit: Seven hundred and fifty dollars on her one-story framed, metal roofed building, belonging to assured and situate on lot No. 6, in Noye's addition to the city of Bedford, Indiana; \$250.00 on boiler and engine, while contained in above described building; \$1,000.00 on machinery and tools, consisting of two drill presses, three lathes, one planer, one blower, one emery stone and frame, and belting for machinery, and patterns and other tools."

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The patterns were burned while in the pattern house, and not in the building described above.

It is contended by appellant that the patterns covered by the policy are only those in the brick building described and while therein. Appellee, on the other hand insists that there is in the policy no limitation as to the location of the patterns.

The rule for the construction of such contracts as this is thus expressed in the case of *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452: "It is settled, as laid down by this court in *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured." This rule governs in our own State. *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Standard, etc., Ins. Co. v. Martin, Admr.*, 133 Ind. 376; *Indiana, etc., Ins. Co. v. Rundell, Admr.*, 7 Ind. App. 426.

We are of opinion that the clauses of the policy under consideration were clearly susceptible, at least, of the interpretation placed thereon by the trial court that they did not limit the insurance on the patterns to such as were, when burned, in the building mentioned, because there was no place described as the location of these articles. We would not be justified in saying that the only construction reasonably permissible is to carry forward the words "while contained in above described building," which define and limit the location of the engine and boiler and apply them by implication to the subsequent clause.

The case of *Hews v. Atlas Ins. Co.*, 126 Mass. 389, dif-

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fers from this in the order of the wording of the phrases in the policy, and we cannot, in harmony with the principles of law above announced, extend it so far as to cover this case.

The special finding of facts sustains the complaint in all material features, and is amply sufficient to support the conclusions of law. In the third finding it fully appears that the patterns burned were those insured.

Although there is conflict in the evidence as to some points, there is some evidence fairly sustaining the findings in all their essential features.

That appellant's agent, when soliciting the insurance, informed appellee that the Germania Insurance Company, which already had a policy upon appellee's property for like amount with this, had ordered it canceled, or that this policy was similar to the one in suit, save that "pattern and other tools" was added to the latter, could not throw any light upon the construction of this policy, which did cover "patterns." These facts do not meet, limit, explain, or modify anything proved by appellee. If there was any error in the rejection of this evidence it was entirely harmless.

Appellee was permitted to prove that when appellant's agent solicited the insurance he spoke about patterns, and they were pointed out to him. In this was no error. Parol evidence is admissible to identify the subject-matter of a contract. *Koehring v. Aultman, etc., Co.*, 7 Ind. App. 475; *Burns v. Harris*, 66 Ind. 536; *Weber v. Illing*, 66 Wis. 79, 27 N. W. 834; *Ganson v. Madigan*, 15 Wis. 158; 2 Pars. on Cont., *page 549.

No other objection was presented to the court below than that this evidence was in contradiction of the written contract. Appellant cannot now be heard to question the agency of the solicitor. It is here con-

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fined to those grounds of objection to which the trial court's attention was called. *Indiana Imp. Co. v. Wagner*, 138 Ind. 658.

Appellee first claimed \$350.00 on account of the loss of the patterns. She afterwards asked and proved \$900.00 as the sum required to make good her loss. There was no error in allowing her to explain the discrepancy by showing that when the first claim was made she believed that according to law the \$1,000.00 insurance must be apportioned to the several articles covered thereby, according to their relative value.

After consideration of all the questions discussed by counsel, we do not find any just cause for reversal.

Judgment affirmed.

STEWART, EXECUTRIX, ET AL. v. LONG.

[No. 1,682. Filed May 26, 1896. Rehearing denied October 18, 1896.]

PLEADING.—Complaint.—Conversion.—In an action for conversion of a stock of goods on which plaintiff held a mortgage as a security for a note, the note and mortgage need not be made part of the complaint. *p. 166.*

SAME.—Complaint.—Conversion.—Demand.—A complaint alleging actual conversion need not aver demand before suit. *p. 166.*

MORTGAGES.—Rights of Junior Mortgagee.—A mortgagee of a stock of goods who takes possession of and sells the same, and receives therefor more than enough to pay the amount of the mortgage and expenses necessarily incurred, must account for the excess to a junior mortgagee. *p. 167.*

SAME.—Conversion by Senior Mortgagee.—Right of Junior Mortgagee to Elect Remedy.—Where a senior mortgagee, upon a breach of a condition of his mortgage has taken possession of a stock of goods and transferred the same to a third party, who has exclusive possession, and is selling the goods and appropriating the goods to his own use, a junior mortgagee has the right to elect whether he would pursue the goods by foreclosure or sue for conversion. *p. 168.*

APPEAL.—Evidence.—Harmless Error.—It is not reversible error to refuse to permit a witness, who testified that he bought a stock of

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goods for \$1,100, partly for cash and partly on credit, and that the stock was worth only \$1,000 cash, to state that he paid the \$100 more because he bought on credit. *p.* 168.

SAME.—*Joint Assignment of Error.*—Where an exception is made to the instructions given as an entirety, unless all the instructions given were erroneous an appeal thereon cannot be sustained. *p.* 169.

From the Tipton Circuit Court. *Affirmed.*

A. J. Beveridge, D. Waugh, J. N. Waugh and J. P. Kemp. for appellants.

W. R. Fertig, H. J. Alexander, G. H. Gifford and C. H. Gifford, for appellee.

LOTZ, J.—One William A. Long executed a mortgage on a stock of drugs, situated in the town of Sharpsville, in Tipton county, to the appellant, Martha H. Stewart, to secure a promissory note of \$887.70. Subsequently the said Long executed another mortgage on the same stock of drugs to appellee, Minnie Long, to secure a note of \$895.00. Each of said mortgages was duly recorded. Upon a breach of a condition in her mortgage, Martha A. Stewart took possession of the stock of goods and afterwards sold the same to the appellant, John E. Wakefield at private sale. The appellee brought this action against the appellants, alleging that the defendants, with full notice and knowledge of the plaintiff's mortgage, took possession of the mortgaged property, which was of the value of \$1,500.00, and sold and converted the same to their own use and mingled the same with other goods, so that it is impossible to identify the same or recover the specific property, and that William A. Long is insolvent.

Issues were joined and there was a trial by jury and a verdict and judgment for the appellee in the sum of \$500.00.

The first assignment of error calls in question the

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sufficiency of the complaint. It is insisted that the complaint is bad because neither the original nor copies of the plaintiff's note and mortgage are set out or made a part thereof. This contention is not well taken. The note and mortgage are not the foundation of the plaintiff's cause of action, but it is the tort or wrong of the defendants in converting the goods and in destroying the plaintiff's security.

It is further insisted that the complaint is bad because no demand is alleged. It is true that the appellant, Martha A. Stewart, had the senior mortgage, and she was entitled to have the goods first applied to the payment of her debt. But this did not give her an absolute right to the property. She was in duty bound to account to the mortgagor and to the junior mortgagee for the excess after satisfying her own debt. If she converted the goods, or if she and her co-defendant destroyed the security, they must answer for the tort.

If an actual conversion be alleged a demand before suit need not be averred. *Koehring v. Aultman, etc., Co.*, 7 Ind. App. 475.

The complaint is unquestionably sufficient to withstand the demurrer.

Another assignment of error is the overruling of appellants' motion for a new trial. It is contended that the verdict is contrary to the law and not supported by sufficient evidence.

The undisputed evidence shows that Martha A. Stewart took possession of the stock of drugs in pursuance of a breach of the terms of her mortgage; that she advertised the same for sale, and on failure to sell at public sale, she sold the stock at private sale to the appellant, John E. Wakefield, and put him in possession thereof; that at the time of such sale she and he both had notice of the existence of the appellee's mortgage, and as a condition of such sale she

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agreed to indemnify him against the liens and mortgages thereon; that she received therefor the sum of \$1,100.00. Wakefield continued in the possession of such stock for several months, retailing the same and replenishing the stock as needed, and commingled the goods purchased with those composing the original stock. William A. Long made payments upon the indebtedness to Mrs. Stewart, which were credited upon the note in the sum of \$185.00, and there was a balance due on the note of \$702.70, not including interest. It is apparent that Mrs. Stewart realized nearly \$400.00 more than her debt. If it be conceded that Mrs. Stewart's title was not absolute, and that the appellee was the *bona fide* holder of the second mortgage, it would be inequitable and unjust to permit her to retain this large amount and prevent the junior mortgagee to share in the surplus. When Mrs. Stewart received enough out of the goods to pay the amount due her on her mortgage and the expenses necessarily incurred, she must account to the junior mortgagee for the excess.

As to whether or not there was an agreement between William A. Long and Mrs. Stewart that the taking possession under mortgage should be an absolute sale, the evidence is conflicting. The evidence of the value of the goods is also conflicting. There was evidence which tended to prove that the goods were worth as much as \$1,500.00. Appellant insists that the evidence shows that a large part of the stock was still in the store and could be identified, and was subject to appellee's mortgage. That some portion of the original stock had been sold by Wakefield, was undisputed, and as to the portion remaining, there was no evidence as to its value. There was nothing to show that the portion remaining was sufficient to satisfy the appellee's mortgage.

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The appellee's mortgage contained a provision that it should include and cover all additions to the stock. Appellants' counsel argue from this that all the goods in stock at the time of the trial were liable for the mortgage and were of sufficient value to fully satisfy the appellee's mortgage, and that therefore this action will not lie. This clause in the mortgage may have been binding upon the mortgagor, but all the additions to the stock were made by Wakefield. It will not be seriously contended that this clause was binding upon Wakefield, and covered such additions as he made. Besides, Mrs. Stewart and Wakefield were each denying the appellee's right to the goods, and Mrs. Stewart sold them absolutely to Wakefield, and Wakefield was in exclusive possession, and sold the goods and appropriated the moneys to his own use. This was equivalent to a conversion. The appellee had the right to elect whether she would pursue the goods by foreclosure or sue for conversion. *Board, etc., v. Trees*, 12 Ind. App. 479; *Criswell v. Whitney*, 13 Ind. App. 67.

The appellant, Wakefield, testified that he purchased the stock of drugs of Mrs. Stewart for \$1,100.00. He paid \$700.00 cash and gave his note for \$400.00. He also testified that the stock was worth only \$1,000.00 cash. The appellants then offered to prove by this witness that he paid \$100.00 more than the goods were worth on account of the favorable terms upon which he made the purchase. This offer was excluded. It is insisted that this ruling was reversible error. The witness repeatedly testified that the cash value was only \$1,000.00. The proposed testimony would have had a tendency to explain his conduct and was proper for such purpose, but it was a matter that only went to his credibility, and does not

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constitute reversible error under the circumstances of this case.

The appellants also insist that the court erred in giving and in refusing to give certain instructions. Several instructions were embraced in each assignment and the assignments are joint. If any one of the instructions given was good, or any one of those refused, properly refused, the assignments fail. Some of the instructions given were good, and some of them are not assailed, and some of those refused were properly refused. *Supreme Council, etc., v. Boyle*, 10 Ind. App. 301.

The appellants also complain of the modification of certain instructions asked by them. It is unnecessary to set out such instructions and the modifications. It is sufficient to say that we have considered them in connection with the other instructions and the evidence, and when so considered there was no error in modifying them.

We find no reversible error in the record.

Judgment affirmed.

ARNOLD v. BRANDT.

[No. 1,964. Filed October 18, 1896.]

HUSBAND AND WIFE. — *Husband's Liability for Necessaries for Wife.*—A husband who has abandoned his wife is liable for necessities furnished the wife after abandonment, when it is shown that her own means are inadequate for her support.

From the Ripley Circuit Court. *Affirmed.*

S. M. Jones and F. S. Jones, for appellant.

J. L. Benham and C. H. Willson, for appellee.

REINHARD, J.—This action was brought by the appellee against the appellant on an account for goods

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and merchandise alleged to have been sold and delivered to appellant and his family at his instance and request. The appellant answered the general denial, and specially that the articles mentioned in the complaint were purchased of appellee by one Mary J. Arnold, the wife of appellant, who has been living separate and apart from appellant since December, 1892, which fact, during all of said time, was well known to appellee; that said Mary J. Arnold, when appellant married her in November, 1892, was the widow of one Samuel Gookins, deceased, and that she had then living children by said Gookins; that she and said children were the joint owners of 100 acres of land worth \$2,500.00, and that said Mary J. Arnold owned personal property of the value of \$500.00; that said Mary J. Arnold has been at all times since she abandoned the appellant the owner of real and personal property and that if she purchased said goods of appellee she did so on her own account and without the knowledge and consent of appellant.

A reply of the general denial closed the issues.

There was a jury trial and a verdict and judgment in appellee's favor for \$97.00. The overruling of appellant's motion for a new trial is the only error assigned.

We are asked to reverse the judgment because of the insufficiency of the evidence.

There was evidence to prove that a portion of the goods (a bill of groceries and provisions) was purchased while appellant and Mary J. Arnold were living together as husband and wife, and used in appellant's family to supply his table while the remaining portion was used by said Mary J. Arnold and her children while she and appellant were separated. The evidence is conflicting as to which of the parties abandoned the other, but there was at least some evidence

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upon which the jury had the right to rely, which showed that appellant abandoned her, and that she was without sufficient means for her support, the appellant having failed to make any provisions for her. Under these circumstances the appellant was liable for the necessities of his wife, although there may have been no direct promise by him to pay for them. *Eiler v. Crull*, 99 Ind. 375; *Watkins v. De Armond*, 89 Ind. 553. The husband owes the wife the duty of supporting and maintaining her, and she may enforce this duty in a proper case by pledging his credit to others who supply her with necessities. 9 Am. and Eng. Ency. of Law, 815 (note 6), 816. While it is true that the obligation cannot be enforced if the wife has sufficient means of her own, we cannot subscribe to the doctrine invoked by the appellant that if she has any means whatever, however small, he cannot be rendered liable. In the present case, as we have said, there was evidence to the effect that her own means were inadequate. While the evidence seemingly preponderates in favor of the appellant, we are not authorized to weigh it and determine its force and effect. The trial judge approved the verdict and we cannot interfere with it.

Judgment affirmed.

FURGASON v. THE CITIZENS' STREET RAILWAY COMPANY OF INDIANAPOLIS.

[No. 2,078. Filed October 13, 1896.]

CARRIERS.—*Street Railway.—Injury to Passenger.*—A street railway company is not liable for injury to a passenger able to travel upon the cars without the aid of an attendant, where the injury is caused by other passengers jostling and pushing her, and one passenger stepping upon her dress as she was alighting, where it is shown that the conductor was at the time upon the ground assisting a child in her care to alight.

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From the Marion Superior Court. *Affirmed.*

J. M. Manker and Pierce Norton, for appellant.

A. L. Mason and W. H. Latta, for appellee.

ROSS, J.—The appellant sued to recover damages for personal injuries alleged to have been received while a passenger of appellee company. On a trial of the cause a special verdict was returned by the jury, upon which the court rendered judgment in favor of the appellee.

The special verdict found by the jury is as follows:

“We, the jury, return the following answers to the interrogatories and special verdict herein:

1. Did the defendant own and operate a street railway in the City of Indianapolis and its suburb, West Indianapolis, on the 29th day of November, 1894?

Ans. Yes.

2. Was not said defendant on the 29th day of November, 1894, a common carrier of passengers for hire in the City of Indianapolis and in the town of West Indianapolis, Marion county, Indiana?

Ans. Yes.

3. Did the plaintiff, on the 29th day of November, 1894, get upon one of said defendant's cars as a passenger to be carried from Shelby street in the City of Indianapolis to Edward street, in the town of West Indianapolis?

Ans. Yes.

4. Was not the regular and customary fare to be paid for such passage five cents?

Ans. Yes.

5. Did plaintiff pay to said defendant the sum of five cents for a passage as a passenger upon its cars between Shelby street in the City of Indianapolis and Edwards street in the town of West Indianapolis?

Ans. Yes.

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6. Was defendant's said car and train upon which the plaintiff was riding under the care and control of a conductor, a servant and agent of the defendant?

Ans. Yes.

7. Did plaintiff notify the conductor that she desired to get off and leave the train of the defendant at Edwards street in the town of West Indianapolis?

Ans. Yes.

8. And was not said defendant's conductor so notified by plaintiff some minutes before the car reached said Edwards street?

Ans. Yes.

9. Did the conductor of the defendant fail and refuse to permit the plaintiff to leave the car and train of defendant at Edwards street?

Ans. Yes.

10. Did the defendant's conductor stop said car at Edwards street?

Ans. Yes.

11. Did said car stop sufficient time for the plaintiff to alight therefrom?

Ans. No.

12. Did not plaintiff rise to her feet and notify defendant's conductor at said Edwards street that she desired to get off at that point?

Ans. Yes.

13. Did defendant's conductor refuse to allow plaintiff to get off at said Edwards street?

Ans. Yes.

14. Did not defendant's conductor give the signal for said car to go on before plaintiff had time to alight from said car at Edwards street?

Ans. Yes.

15. Did the defendant carry the plaintiff beyond said Edwards street and to Osgood street, in said town of West Indianapolis?

Ans. Yes.

16. Did the conductor stop said car at Osgood street?

Ans. Yes.

17. From the time the car left Edward street until the car reached Osgood street did not plaintiff stand near the door of said car?

Ans. Yes.

18. Did plaintiff attempt to get off said car at Osgood street?

Ans. Yes.

19. At the time the plaintiff attempted to get off the car at Osgood street, where was defendant's conductor?

Ans. On the street.

20. Was plaintiff crowded and pushed by the passengers on the defendant's car when she was attempting to leave the same?

Ans. Yes.

21. What assistance did the defendant's conductor give the plaintiff when she was attempting to leave the car?

Ans. None.

22. Was the step of the defendant's car slippery from ice or sleet at that time?

Ans. Yes.

23. Did the plaintiff slip on the step of the car at the time she was attempting to alight therefrom?

Ans. No.

24. Did the plaintiff fall to the ground from defendant's car on account of her slipping on its car step?

Ans. No.

25. Was plaintiff injured by reason of said fall?

Ans. Yes.

26. Was not the conductor of the defendant off of

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the car at the time the plaintiff attempted to alight therefrom?

Ans. Yes.

27. What prevented the conductor of the defendant from assisting or knowing that the other passengers upon the platform were crowding the plaintiff at the time she was attempting to alight from said car?

Ans. Assisting plaintiff's child.

28. What effort, if any, did the conductor make to prevent the other passengers from crowding and pushing the plaintiff as she was alighting from the car of the defendant?

Ans. None.

29. Under the circumstances was the plaintiff guilty of neglect contributing to her injuries?

Ans. No.

30. What negligent act of plaintiff contributed to her said injuries?

Ans. None.

31. Could the defendant's conductor have prevented the crowding of the plaintiff by other passengers on the car?

Ans. No.

32. Was it raining and freezing at the time she took passage on said car?

Ans. Yes.

33. Did the plaintiff pay her fare as a passenger on said car?

Ans. Yes.

34. Did said car stop for the purpose of allowing plaintiff to alight?

Ans. Yes.

35. If so, where did it stop?

Ans. Osgood street.

36. At what time in the day did it so stop?

Ans. About 6:00 p. m.

37. Did the plaintiff have good reason to believe that the step on said car was icy at that time?

Ans. Yes.

38. Did the plaintiff have good reason to believe that the surface of the street at that place was icy at that time?

Ans. Yes.

39. Was plaintiff's little girl with her as a passenger on said car?

Ans. Yes.

40. When plaintiff was preparing to leave the car did the little girl come first to the step where the plaintiff was to alight?

Ans. Yes.

41. Was the conductor of the car on the ground near the step to assist plaintiff and her little girl to alight from the car?

Ans. Yes.

42. Did the conductor of the car lift the little girl from the platform and place her upon the ground?

Ans. Yes.

43. Did plaintiff fall from the car when attempting to alight?

Ans. Yes.

44. After the conductor had helped the child to the ground did he have time to get hold of the plaintiff before she fell?

Ans. No.

45. Was plaintiff jostled or pushed from behind by another passenger just as she was about to step down upon the step of the car?

Ans. Yes.

46. Was her dress caught and torn by another passenger stepping upon it or placing his cane upon it just as she was about to step down upon the step of said car?

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Ans. Yes.

47. Did the catching or holding of the dress, the push or jostle of the plaintiff by the passenger and the icy step cause her fall?

Ans. Yes.

48. State what caused plaintiff's fall or plaintiff to fall when alighting from the car?

Ans. Jostle, pushing and holding of dress.

49. Did the plaintiff sustain injury by such fall?

Ans. Yes.

50. Was any injury sustained by the fall aggravated in its consequences by plaintiff's failure to procure proper medical treatment?

Ans. Yes.

51. In what amount was the plaintiff damaged by her said injury?

Ans. \$500.00.

52. In what amount would she have been damaged if she had obtained proper medical treatment?

Ans. \$300.00.

53. Was not the plaintiff at the time she received her said injuries, pregnant and heavy with child?

Ans. Yes.

54. To what extent was plaintiff damaged by her injuries?

Ans. \$500.00.

55. Has plaintiff been permanently injured in her health?

Ans. No.

56. Did not the plaintiff miscarry on account of the injuries received?

Ans. Yes.

57. If so, how much has she been injured?

Ans. \$500.00.

If upon the foregoing facts the law is with the
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plaintiff, we find for the plaintiff and assess her damages at \$500.00. If the law is with the said defendant, we find for the defendant."

The appellant insists that upon the facts found she was entitled to a judgment against the appellee.

In support of their contention counsel for appellant rely upon the following as general legal propositions applicable to the facts in this case, viz:

1st. That "a common carrier of passengers is bound to carry and transport for hire persons who are sick, weak and debilitated," and "to see and know the care required to safely carry and transport such a one, and if it accepts such a one as a passenger, its contract holds it to perform and carry out its obligation in such a way as to protect such passengers from injuries."

2d. That when a common carrier of passengers "accepts a woman 'pregnant and heavy with child' public policy as well as humanity demands that it shall use ordinary care and see to it that she is carried so that she will not be bruised, maimed and injured."

3d. "When injuries are shown to have been sustained, without the fault or negligence of the injured party * * * the law casts the burden upon the common carrier to show that such injuries were not the result of negligence or want of care on the part of the common carrier."

As a general rule a common carrier of passengers is bound to accept and transport upon equal terms, all persons seeking passage, who conform to such reasonable conditions as it may establish and impose for the proper and safe transaction of its business. Its duty is to extend to all applicants like rights and privileges and to exact no greater or more stringent obligations from one than another under like circumstances. It would not be required to accept and trans-

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port one having a contagious disease, which might be communicated to other passengers. Neither would it be required to accept and transport as a passenger one whose presence would endanger either the safety or reasonable comfort of its other passengers, or who would injure its property or in any way interfere with the operation of the train, or the carrier's servants in the performance of their duties. Its duty is to accept and transport all those who are in proper condition to be transported and who will not interfere with the rights of other passengers, or the carrier and its servants in the operation of the road. If a carrier accepts a passenger *knowing* that he is sick or infirm it must use ordinary care to see that he is transported safely and is given a reasonable time and proper assistance in getting on and off its cars. Able-bodied persons, whether men or women, who appear physically able to get on and off the cars, the carrier is ordinarily under no legal obligation to assist.

"The law requires common carriers of passengers to take and carry every one who desires to go, provided they have room, and there be no objection on account of the condition, habits, character, deportment, or purposes of the passenger," say the court in *Galena, etc., R. R. Co. v. Yarwood*, 15 Ill. 468.

"It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers. * * * Healthy passengers in a palatial car would not be provided with reasonable accommodations, if they were there unreasonably or negligently exposed, by the carrier, to the society of small-pox patients. Sober, quiet, moral, and sensitive travelers may have cause to complain of their accommodations, if they are unreasonably ex-

posed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense, they would not. The feelings not corporal, and the deencies of progressive civilization, as well as physical life, health, and comfort, are entitled to reasonable accommodations." *McDuffee v. Railroad*, 52 N. H. 451.

In the case of *Meyer v. St. Louis, etc., R. W. Co.*, 54 Fed. 116, Shiras, J., says: "It is well settled that a common carrier is not obliged, as a matter of law, to receive as a passenger an insane or drunken person, or one whose physical or mental condition is such that his presence upon the vehicle of the carrier may cause injury or substantial discomfort to the other passengers." And in support of the proposition, cites *Wood R. W. Law*, 1035; *Putnam v. Broadway, etc., R. R. Co.*, 55 N. Y. 108; *Pearson v. Duane*, 4 Wall. 605.

In a number of cases has it been held that a carrier is not bound to accept as a passenger one whose ostensible business is to injure the carrier's property or business; one fleeing from justice; one going upon the train to assault a passenger or commit larceny or robbery, or for interfering with the proper regulations of the company, or for the purpose of gambling, or to commit any crime. Nor is it bound to accept one as a passenger who is physically or mentally disabled and unable to take care of himself. *Thurston v. Union Pac. R. R. Co.*, 4 Dill (U. S.) 321; *Barney v. Steamboat Co.*, 67 N. Y. 301; *Jencks v. Coleman*, 2 Sumner 221; *Bennett v. Dutton*, 10 N. H. 481; *Vinton v. Middlesex R. R. Co.*, 11 Allen (Mass.) 304; *Walsh v. Chicago, etc., R. R. Co.*, 42 Wis. 23; *Milliman v. New York, etc., R. R. Co.*, 66 N. Y. 642; *Croom v. Chicago, etc., R. W. Co.*, 52 Minn. 296, 18 L. R. A. 602, 53 N. W.

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1128; *Pittsburgh, etc., R. R. Co. v. Pillow*, 76 Pa. St. 510; *Arnold v. Illinois, etc., R. R. Co.*, 83 Ill. 273; *Pittsburgh, etc., R. W. Co. v. Vandyne*, 57 Ind. 576.

A carrier is not bound to turn its cars into nurseries, prisons, or hospitals, or its employes into nurses or jailers. Neither is it required to furnish medical attendance, medicines or other articles necessarily needed by the sick. If a person desiring to become a passenger, is unable, on account of extreme youth or old age, or any mental or physical infirmities, to take care of himself, he ought to be provided with an attendant to take care of him. The carrier is not bound to furnish him an attendant.

It is the duty owing from a carrier to all of its passengers alike, whether sick or well, able bodied or infirm, old or young, rich or poor, white or black, to use at least ordinary care in their transportation and any negligence on its part resulting in injury to a passenger without the passenger's negligence contributing thereto must be answered for in damages.

So far as the facts found disclose, the appellant was able to go about the streets and travel upon the cars without the aid, care or attention of an attendant. In fact it appears that at the time she was injured, she had under her charge and control, a child whom the conductor of the car was helping to alight from the car at the time appellant was alighting. There is nothing in the facts disclosing any want of care or attention on the part of the appellee or its servants, which had anything to do with appellant's injury. In fact the conductor of the car was assisting appellant to alight by helping her child off the car and no doubt had the time and opportunity been offered after helping the child from the car, he would have given his assistance and kindly offices to appellant in her efforts to alight safely. The cause as found by the jury,

which brought about the appellant's injury was the jostle and pushing by other passengers, and the further fact that another passenger stepped his foot, or placed his cane upon her dress just as she was stepping onto the car step.

The appellee was not answerable under the facts disclosed in this case either for the pushing or jostling of the appellant by the other passengers, or for the act of the other passenger in stepping his foot or placing his cane upon her dress.

These were the causes, the jury found, which brought about appellant's injury. The appellee was not answerable for them and no right of action accrued in appellant's favor against appellee, by reason thereof. To say, as counsel in their brief insist, that a common carrier must at its peril not only carry safely, but see that no person is injured in alighting either by reason of their own negligence or the negligence of other passengers, would be to carry the rule beyond that declared by any other reputable court that we know of, and to hold the carrier a warrantor of the passenger's absolute safety against all contingencies, and would be to hold that the law assumes not only that the party himself and all other passengers were careful and prudent, but that the injured party's own negligence did not contribute to his injury. The rule, however, is that the burden rests upon the injured party to establish the fact that he was free from negligence contributing to his injury. The carrier does not warrant the passenger's absolute safety, but it does agree to exercise due care and diligence in his transportation.

Whether the appellant herself was or was not free from fault we need not consider, for it is sufficient for the purposes of this decision to decide as we have already stated that the facts found by the jury are

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wholly insufficient to warrant an inference of actionable negligence upon the part of the appellee.

The judgment of the court below is in all things affirmed.

BROWER ET AL. v. NELLIS ET AL.

[No. 1,607. Filed October 14, 1896.]

TRIAL.—*Burden of Proof.*—*Right to Open and Close.*—Where no issue is formed on the complaint, and the only issue is upon a counterclaim filed by the defendant, the defendant has the burden of proof, and has the right to open and close.

From the Montgomery Circuit Court. *Reversed.*

P. S. Kennedy and *S. C. Kennedy*, for appellants.

James Wright and *James M. Seller*, for appellees.

ROSS, J.—On the former appeal of this cause, *Brower et al. v. Nellis et al.*, 6 Ind. App. 323, it was decided that the pleading filed by the appellants as an answer to the complaint, was not in fact an answer, and did not state a good defense to the action, but was a counterclaim and as such was sufficient to withstand a demurrer.

The only pleadings filed as shown by the transcript before us were the complaint, the pleading, denominated an answer, but as heretofore stated, held to be a counterclaim, and a reply to such answer (counterclaim) in three paragraphs, of which the first was a general denial. No issue was formed on the complaint, the only issue being upon the counterclaim.

Ordinarily the issues formed by the pleadings determine the right to the open and close on the trial of the cause. The party upon whom rests the burden of the issue, as formed by the pleadings, is entitled to

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the open and close. Upon a trial of the issue formed on the appellants' counterclaim the burden rested upon the appellants. The court below, therefore, erred in refusing to permit the appellants to have the open and close on the trial upon the issue formed on the counterclaim.

Judgment reversed with instructions to sustain the motion of the appellants for a new trial.

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[No. 1,908. Filed June 18, 1896. Rehearing denied Oct. 14, 1896.]

LABORER'S LIEN.—*Superior to a Prior Chattel Mortgage.*—*Statute Construed.*—Under section 7051, Burns' R. S. 1894 (5206, R. S. 1881), providing that when the business of any person shall be suspended by the action of creditors, the debts owing to laborers, not exceeding \$50.00 to each laborer, for work performed within the next preceding six months, shall be preferred and first paid in full, a transfer by an employer of all his property to a chattel mortgagee creates a superior lien in favor of such laborers.—Reinhard and Ross, JJ. Dissenting. pp. 185-190.

SAME.—*Statute Liberally Construed.*—Statutes providing that laborers shall be preferred creditors when the business of their employer shall be suspended by the action of creditors, are remedial in their nature, and are liberally construed. p. 190.

PLEADING.—*Action to Enforce Laborer's Lien.*—*Estoppel.*—In an action by a laborer to enforce his lien under section 5206, Burns' R. S. 1894, an answer of estoppel counting upon plaintiff's failure to make known his claim is bad, when defendant's want of knowledge of its existence is nowhere alleged. p. 191.

SAME.—*Demurrer.*—*Harmless Error.*—Sustaining a demurrer to a bad pleading is a harmless error, although the demurrer is insufficient to test the pleading. p. 191.

LABOR LIENS.—*Statutes.*—The Act of March 3, 1885, which makes no provision for, and does not cover, the subject of labor liens except where the property has passed into the hands of an assignee or receiver does not cover the whole subject matter and repeal by implication the Act of 1879 (section 5206, R. S. 1881). p. 192.

From the Allen Circuit Court. *Affirmed.*

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P. A. Randall and N. D. Doughman, for appellants.
J. M. Robinson, for appellee.

GAVIN, J.—On October 25, 1894, one Jasper was engaged in keeping a livery stable at Ft. Wayne. At this time and prior thereto, one Bell held a mortgage on the property used by Jasper in said business, viz: certain horses, carriages, etc., “and all other chattels belonging to the said Jasper in said barn” to secure \$1,000.00, this being more than the value of the property. Jasper being upon that day insolvent, threatened with suit and pressed for payment by Bell and unable to meet his liabilities, at his request conveyed to Bell all of said property in payment of said debt, and his business was on said day and thenceforth continuously suspended by the actions of said Bell, who afterward sold the property to one Martin, who had knowledge of appellee’s claim. Appellee was a laborer employed in the stable, to whom seven weeks’ wages was due for work performed within that period last preceding the sale, and subsequent to the execution of the mortgage and the due recording thereof.

Section 7051, Burns’ R. S. 1894 (5206, R. S. 1881), provides that when the property of any person engaged in business “shall be seized, upon any mesne or final process of any court of this state, or where their business shall be suspended by the action of creditors or put into the hands of any assignee, receiver or trustee, then in all such cases the debts owing to laborers or employes, which have accrued by reason of their labor or employment, to an amount not exceeding \$50.00 to each employe, for work and labor performed within six months next preceding the seizure of such property, shall be considered and treated as preferred debts, and such laborers or employes

shall be preferred creditors and shall be first paid in full, and if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata*, after paying costs."

Under this section appellee sought to enforce a lien for \$50.00 against the property in Martin's hands.

Appellants assert, 1st, That by the statute no lien is created nor any charge made against the property unless it shall come into the hands of some officer, assignee, or other trustee under the court, to be administered upon according to law; 2d, That even if a lien is created it is junior to the lien of the mortgage.

Under our authorities neither position is tenable.

The statute it is true does not in terms create any express lien *eo nomine*, but the Supreme Court in *Bass v. Doerman*, 112 Ind. 390, decided that by this statute a lien was given to the laborer superior to the rights of, and enforceable against, one to whom the property of the insolvent debtor was sold in payment of debts due the purchaser, where the business of the debtor was by such action of the creditor thereby suspended. The court's liberal construction of this statute has been approved in subsequent cases. *Farmers', etc., Co. v. Canada, etc., R. W. Co.*, 127 Ind. 250, 11 L. R. A. 740; *Aurora, etc., Bank v. Black*, 129 Ind. 595; *Pendergast v. Yandes*, 124 Ind. 159. Counsel rely upon *Wilkinson v. Patton*, 162 Pa. St. 12, 29 Atl. 293, as establishing a different and better doctrine. There is some difference in the statutes by which the cases may perhaps be distinguished. In any event, however, we are satisfied to follow the adjudications of our own court.

In *State, ex rel., v. Aetna Life Ins. Co.*, 117 Ind. 251, it is said by Elliott, J., when considering the question of superiority of a statutory lien over a prior mortgage lien: "The statute must determine the character and extent of the lien. * * * It is not necessary that

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it should in express terms, declare that the lien shall be a paramount one, for if the intention can be gathered from the general words and purposes of the statute, the courts will give it effect." This is in harmony with the principle asserted by the Supreme Court of Massachusetts, which says, in *Dunklee v. Crane*, 103 Mass. 470, "The statute contains no express provisions that the lien shall attach and have priority over mortgages and other incumbrances created after the contract, but such is the necessary implication." It also accords with *City of Puterson v. O'Neill*, 32 N. J. Eq. 386.

It is true, as urged by appellants' counsel, that the Bass case does not decide that the labor lien is superior to a prior mortgage, that question not being involved; but it does decide that the debt is a charge against the property in the hands of a purchaser for value. The word lien "includes every case in which personal or real property is charged with the payment of a debt." Anderson's Law Dict., 623.

In *Warren v. Sohn*, 112 Ind. 213, it was claimed that mortgage liens were superior to subsequent miners' labor liens, although the statute declared that such labor liens should be paramount to, and have priority over, all other liens except taxes; yet the court decided that the statutes must be given effect and the mortgages yield to the labor liens. Here the statute directs that the labor claim shall be preferred, and shall be "first paid in full." It being established, as it is by the Bass case, that the statute gives a lien for the labor claim, then it seems to us the intent that it shall be a paramount lien is clearly expressed. If it is to be "first" paid in full we do not well see how the mortgage can come in before it.

When the mortgagee accepted his mortgage, he must be deemed to have done so with knowledge that

if the business was continued, and the contingency contemplated by the statute should occur, then the labor debts would be preferred and must be first paid. The law entered into the mortgage contract as a silent but potent factor, and the mortgagee accepted it subject to such rights as might accrue to others under the law. *Warren v. Sohn, supra; Farmers' etc., Co., v. Canada, etc., R. W. Co., supra*, p. 264; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576.

As said in some of the cases it is wholly voluntary upon the part of the mortgagee whether he will accept a mortgage with the limitations by law incorporated therein.

In *Provident Institution v. Jersey City*, 113 U. S. 506 it was decided that a statutory lien for water rent was superior to mortgages executed prior to the attaching of the supply pipes to the mains. It is said, "when the complainant took its mortgages, it knew what the law was; it knew that by the law if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgage subject to this law." To the same effect are *Vreeland v. O'Neil*, 36 N. J. Eq. 399, and *Vreeland v. Jersey City*, 37 N. J. Eq. 574.

There the statute made the water rent assessment a "lien thereon from the time of the confirmation thereof until paid, notwithstanding any devise, descent, alienation, mortgage or other encumbrance thereon." This language was adjudged to make the water rent paramount to prior mortgages, although it was not so expressly declared in the statute.

The principle upon which a mortgage is subordinated to a statutory lien authorized and made superior by a statute in force when the mortgage is executed is not by any means new or novel. Nor does

Indiana stand alone in thus providing security for the wage earners who depend upon their daily toil for support. For many centuries, in admiralty, the rights of seamen to their wages have been held superior to the mortgagees of the vessel. *The J. A. Brown*, 2 Lowell 464; 2 Jones on Liens, section 1775.

In Mississippi the liens of agricultural laborers are made superior to prior mortgages. *Buck v. Payne*, 52 Miss. 271; *Bruck v. Paine*, 50 Miss. 648.

In Michigan the wages of miners are given liens paramount to all others. *McLaren v. Byrnes*, 80 Mich. 275, 45 N. W. 143.

In that state, as in ours, no notice of lien need be given, but the court says: "All persons are bound to take notice that unpaid laborers for a mining corporation in the Upper Peninsula have a lien for their labor upon all the real and personal property of the corporation in that portion of the state."

In Iowa we find the decisions exactly in harmony with our own. There is a statute similar to ours, substantially identical in terms, so far as it relates to the matters herein involved. It does not in terms create a lien nor declare it paramount to prior mortgages, but provides as does ours that the debts owing to laborers "shall be considered and treated as preferred debts and such laborers and employes shall be preferred creditors, and shall first be paid in full; and if there be not sufficient to pay them in full, then the same shall be paid to them pro rata after paying costs." In *Reynolds v. Black*, 91 Ia. 1, 58 N. W. 922, the question was presented as to whether, when the property had been taken by mortgagees, the laborers had any lien, and, if so, whether it was superior to the mortgages.

There as here it was "contended that no lien is given to the laborer, that to give him preference over

existing liens is to displace such liens, and that the preference only applies to what is left after satisfying existing liens;" but the court said: "To so construe this statute would largely defeat its manifest purpose;" and adjudged that there was a lien superior to the mortgages. The doctrines of this case are reaffirmed by *St. Paul, etc., Co. v. Diagonal Coal Co.* (Ia.), 64 N. W. 606.

We are not able to perceive that any general disaster will be brought upon the business interests of the community by our holding. The lien does not attach save in those cases where there has been a seizure by an officer or a collapse of the business; and it is, under this statute, in the absence of fraud, limited to the property then belonging to the debtor. Thus the ordinary everyday transfer and sale of property in the usual course of a going business will not be affected. The smallness of the amount of the liens also serves to lessen our apprehension as to the evil results to follow from the application to this case of the ordinary rules of law, and the giving effect to the plain letter of the statute as to the order of precedence. A result which affords to the day laborer protection to the amount of \$50.00 does not appear to us so highly inequitable as to call for any strained or fanciful construction of the statute.

That he "shall be a preferred creditor and shall first be paid in full" seems to us simple, plain English, easily understood, the meaning of which would not ordinarily be mistaken by the average man. Neither is the statute to receive a strict construction as being in derogation of the common law. It is remedial in its nature. As was said by the Supreme Court in speaking of a statute similar in character and enacted for a similar purpose, viz: "to secure to employes of corporations an efficient remedy for the collection of

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money due them for wages." "Such statutes are not only constitutional, but they are to be liberally construed with a view of rendering effectual the purpose of the statute." In any event the law is plain and if not wise the remedy is by legislative repeal rather than by judicial nullification.

Assuming without deciding that the complaint must show a transfer of all the property used in the business, we are of opinion that this fact sufficiently appears. The averment in substance is that Bell, on October 25, 1894, had a mortgage on all the chattels in the barn and that this property was turned over to him.

The answer of estoppel was clearly bad. It counted upon appellee's failure to make known his claim; appellants' want of knowledge of its existence is nowhere alleged. This was essential to enable him to obtain the benefit of appellee's silence as an estoppel. *Roberts v. Abbott*, 127 Ind. 83; *First National Bank v. Williams*, 126 Ind. 423.

Earlier cases held that it was reversible error to sustain a defective demurrer to an answer without reference to its sufficiency. *Gordon v. Swift*, 39 Ind. 212; *Dugdale v. Culbertson*, 7 Ind. 664. Later and better considered decisions, however, declare the law to be that although the demurrer be insufficient to test the pleading and might be overruled without error, yet if it is in fact sustained and the pleading is really bad, then no harmful error occurs. *Wade v. Huber*, 10 Ind. App. 417; *Foster v. Dailey*, 3 Ind. App. 530; *Firestone v. Werner*, 1 Ind. App. 293; *Board v. Gruver*, 115 Ind. 224; *Palmer v. Hayes*, 112 Ind. 289; *Hildebrand v. McCrum*, 101 Ind. 61.

We are unable to see that the degree of insufficiency or informality of the demurrer affects the application of the principle thus established.

It is argued that upon the principle declared in *Eversole v. Chase*, 127 Ind. 297, section 7051, Burns' R. S. 1894, is not in force, because it was an amendment of a statute, section 5206, R. S. 1881, passed in 1879, which had been repealed by implication by the passage of the act of March 3, 1885, E. S., section 1598, being section 7058, Burns' R. S. 1894.

"Repeals by implication are not favored in the construction of the statute;" yet "it is ordinarily true that the enactment of a new statute covering the whole subject-matter of an older statute and containing provisions that cannot be reconciled with it, operates as an implied repeal of the older one. *Robinson v. Ripey*, 111 Ind. 112."

This is the rule declared by this court through Davis, J., in *Allen v. Town of Salem*, 10 Ind. App. 650. It was further said in the same case, "In order to effect such repeal by implication, it must appear that the subsequent statute revised the whole subject-matter of the former one, and was intended as a substitute for it, or that it was repugnant to the old law."

The act of March 3, 1885, makes no provision for, and does not cover, the subject of labor liens where the property has not passed into the hands of an assignee or receiver, but is confined to those cases where it does come into the hands of an assignee or receiver. It falls far short of covering the whole subject-matter of the act of 1879; nor is there any good reason why both should not stand together. Upon the principles of law announced in the *Town of Salem* case, *supra*, and the authorities therein cited, we are of opinion that the act of March 3, 1885, did not repeal the law of 1879.

Judgment affirmed.

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DISSENTING OPINION.

REINHARD, J.—The appellee performed work and labor for one Jasper, the owner and keeper of a livery stable. These services were rendered during the seven weeks immediately preceding the 25th day of October, 1894, and amounted to about \$60.00. Prior to that date, viz.: on January 9, 1894, Jasper had executed a chattel mortgage on the stock and other contents of the stable to the appellant Bell, to secure him in the payment of a *bona fide* debt of \$1,000.00. The mortgage was duly recorded and was in all respects regular and for an amount equaling the entire value of the property to which it attached. Jasper in good faith transferred the property to Bell in payment of his mortgage debt, and Bell sold and transferred it in turn to appellant Martin for a valuable consideration. Martin had full knowledge of appellee's claim at the time of the purchase.

Appellee asserts a lien upon the property prior and paramount to the interests of the appellant Martin. It is agreed that whatever rights the appellee has acquired are founded upon and grow out of the provisions of section 7051, Burns' R. S. 1894 (5206, R. S. 1881). That section reads as follows:

"Hereafter, when the property of any company, corporation, firm or person, engaged in any manufacturing, mechanical, agricultural or other business or employment, or in the construction of any work or building, shall be seized upon any mesne or final process of any court of this state, or where their business shall be suspended by the action of creditors, or put into the hands of any assignee, receiver or trustee, then in all such cases the debts owing to laborers or employes, which have accrued by reason of their labor or em-

ployment to an amount not exceeding \$50.00 to each employe, for work and labor performed within six months next preceding the seizure of such property, shall be considered and treated as preferred debts, and such laborers or employes shall be preferred creditors and shall be first paid in full, and if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata*, after paying costs."

Waiving all technical questions, and assuming the statute cited to be in force, and that it has not been repealed by implication as seems to have been intimated or at least questioned in the case of *Eversole v. Chase*, 127 Ind. 297, and granting that the conditions are such as entitle the appellee to enforce his claim under the statute, over the chattel mortgage and the rights growing out of the same, the proposition we are to determine is whether the mortgagee of a chattel mortgage, executed in good faith, and for a valid debt, or the assignee of such mortgage, may under the provisions of this section be cut out and deprived of the benefits of a legally acquired mortgage lien by a claim of the character of that of the appellee in this action, originating as much as nine months subsequent to the execution and the recording of such mortgage; and whether by virtue of the same section, by mere silence and without any legal steps being taken by which the intention to hold such a lien is declared and made a matter of public record, a charge may be fastened upon the mortgaged property superior and paramount to that of a chattel mortgage more than nine months old and that, too, in the absence of an express provision to that effect in the statute itself.

I am of the opinion that the case of *Bass v. Doerman*, 112 Ind. 390, does not decide that the employe acquired a lien which is even of as high a character as a chattel mortgage or other lien that accrued prior to

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the time of the performance of the labor of the employe, and that acquires validity only by being recorded or by having notice thereof made a matter of public record. A careful reading of the case cited will show, as I think, that it does not sustain the view taken by the majority. What the court doubtless intended to hold, and as it appears to me did hold, was that a claim of the character of the appellee's in the present case should have preference over that of any general creditor of the insolvent for debts that had accrued during the same period in which the laborer's lien accrued, and that a transfer of the property in payment of such a general debt cannot be made to deprive the laborer of his claim; in other words, that general claims and debts against the concern which accrued contemporaneously with the claim of the employe should be deferred to the latter, and that the fund arising from the sale of the property should be used to pay such preferred claims in full before payment of general claims. There is no intention from anything that appears in the statute itself, as I read it, that the laborer was to acquire a lien at all, except a mere charge on the assets entitling him to preference over general creditors, much less one of such a superior character as to reach back and become paramount to all other liens, of whatever nature, that were created before the performance of the labor constituting the basis of the employe's claim. A debt may be a preferred debt in a sense, and yet not be superior to another debt for which a lien is given, and so a creditor may be a preferred creditor and still his claim may not be superior to that of lien holders. The word "preferred" is a relative term. It necessarily refers to something else, and means that the thing to which it is attached has some advantage over another thing of the same character, which but for such ad-

vantage would be like the other. *State v. Cheraw, etc., R. R. Co.*, 16 S. C. 524. Under this definition a preferred debt or claim, which is not a lien, is superior only to another preferred debt or claim of the same character, or that is not a lien. It is never superior to a lien unless made so expressly by the terms of the law. When we speak of "preferred claims" in connection with the settlement of decedents' estates, for example, we do not necessarily mean claims that are superior to liens, or even equal to them. Thus a physician's bill for services in attending the decedent in his last illness is a preferred claim or debt, and the physician holding such claim is a preferred creditor, but this does not mean that his claim is superior to that of a mortgage or other lien created in the life time of the decedent. The same is true of funeral expenses, expenses of administration, etc. Such a claim is preferred simply to the general debts of the decedent; that is to say, to debts or claims that are not liens, and it becomes a charge upon the assets of the estate to be administered in preference to such other debts or claims that are not liens, just as a claim of the character with which we are now dealing is a charge upon the assets of the insolvent and is preferred to other debts not liens. But it does not become superior to those claims which are liens. Hence I do not see by what process of reasoning the conclusion can be reached that the statute in construction makes the claim of the appellee a lien superior and paramount to all other liens, of whatever character and antiquity, that may exist against the insolvent's property.

Granting, however, that the Bass case referred to does decide that the laborer has a lien, and that the statute provides that the same shall be a preferred lien (which I do not see how it can be admitted), the question still remains, to what liens or claims is it pre-

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ferred or superior? How far back may the preference be carried under the provisions of the statute? The majority opinion holds that the labor lien is prior and superior to all other liens, even those previously created.

The section referred to provides that claims of employes shall be preferred which have accrued for work or labor performed within the six months next preceding the seizure of the property or the suspension of business. If other liens have attached during that period to which the employe's lien is to be preferred, and a preference is given over liens, that preference must allude to liens that accrued with the same period as the employe's lien; or, in other words, to liens of the same character as to age. There is no language in the decision of *Bass v. Doerman*, *supra*, or in the statute itself which even remotely intimates, much less warrants, a construction which would give the employe a lien antedating that of a mortgage or other lien on the property given to secure a *bona fide* debt, and executed and recorded more than nine months before the seizure or sequestration of the chattels. To hold that the laborer by virtue of this law has a lien for his wages superior to all other liens, then or before then existing, is to inject into the statute language which is not there, and to enlarge by construction the scope of the rights conferred by this statute far beyond anything ever contemplated by it, even when the same is considered in the most favorable light of any interpretation placed upon it by the *Bass* case.

If such a construction is to prevail, a class of liens will be created which was never intended and which in the language of the Supreme Court of Pennsylvania, would be "of the most dangerous and obnoxious character. No one could purchase property without assum-

ing the risk of the insolvency of the vendor." *Wilkinson v. Patton*, 162 Pa. St. 12, 29 Atl. 293.

More than that, no one who has taken a chattel mortgage to secure a debt, however sacred, will have any reason or ground to feel secure in the validity or priority of his lien, although the public records may be absolutely clear as to the property of the debtor covered by such mortgage. If this be the law, and A sell to B a valuable horse, taking from the purchaser a chattel mortgage upon the animal to secure a balance of the purchase money still due, and B embark in the livery business, placing the horse in said business as part of the capital stock or assets thereof; or if B sell the horse to C, who afterward engages in such business, using the animal therein, every laborer or employe in the service of B or C would acquire a lien upon said horse for the value of his services for not exceeding \$50.00, which would be superior to that of the original owner for the purchase money. The same is true of other personal property. The farmer who sells a cow and takes a mortgage for all or a portion of the purchase money, will be postponed in the collection of his debt or enforcement of his lien to the dairy maid who has rendered services in milking her. The coachman will have a prior lien upon the team of horses groomed by him, to a former owner who holds a mortgage for purchase money, and so on, *ad infinitum*. I do not believe that any such injustice, not to say absurdity, was contemplated by the enactment of this statute, yet these are only some of the many pernicious results that will be sure to flow from such a construction, if it should be upheld.

It is an old and familiar principle that statutes which are in derogation of common or private rights, or which confer special privileges, or impose special burdens or restrictions upon individuals, or upon any

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class of persons, which are not shared by others outside of such class, are to be strictly construed. Black Interp. of Laws, 300. But the construction of the prevailing opinion, while its effect will be to greatly restrict the rights and interests of lienholders other than the class established by this construction, and to confer special privileges upon the class of persons coming within the provision of the law thus construed, that cannot be enjoyed by others outside of such class, would be an excessively free interpretation in favor of the class benefited, thus violating as it occurs to me, one of the fundamental and cardinal rules of statutory construction. And to say, as does the majority opinion, that the creation of such a preferred lien by mere construction affects only the remedy and not any right of the parties is to my mind, incomprehensible. A lien given by statute is not a remedy and to so characterize it would be a misapplication of the term, as much so as it would be to say that a mortgage was but a remedy. *Atkins v. Little*, 17 Minn. 342. Statutes relating to remedies affect merely the course and form of the proceedings, and not the substance of the judgment to be pronounced. The withdrawing of a means of enforcing a right already existing strikes at the right itself and impairs the obligation of the contract. *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388.

Much stress seems to be laid upon the fact that our Supreme Court, in several cases, has given to statutes of a similar nature, what is claimed to be, an equally broad interpretation and has expressly approved the decision in *Bass v. Doerman*, *supra*. I think, however, when the cases which it is claimed contain such approval are closely examined, it will be found that they are not at all analogous in principle to the case at bar,

although in some of these cases the phrase "liberal construction" is made use of.

Thus, in *Pendergast v. Yandes*, 124 Ind. 159, no question of superiority of one lien over another arose, but the sole point discussed and decided was that the plaintiff, who was the superintendent of the defendant's lines of gas pipes, with authority to hire and discharge employes, was a laborer within the meaning of the statute and was therefore entitled to have his claim for wages declared a preferred claim, as against the claims of general creditors.

The case of *Farmers', etc., Co. v. Canada, etc., R. W. Co.*, 127 Ind. 251, has reference to a mechanic's and materialman's lien upon a railroad, and does not involve the construction of the statute in consideration, although the case of *Bass v. Doerman*, *supra*, is cited to the proposition that when the mortgagee accepted his security he must have contracted with a view to future labor to be performed, and for which he knew the law would give the employes a preferred lien. But in the case alluded to (*Farmers', etc., Co. v. Canada, etc., R. W. Co.*), while the priority of the laborer's lien was upheld, it was done upon the principle and for the reason that when the mortgagee accepted the chattel mortgage the property mortgaged had in fact no existence, for the railroad had not been built, and that the laborer had subsequently bestowed such work upon it as rendered it much more valuable than it was when the mortgage was executed; and, in fact, "gave all there was of value to the property claimed under the mortgage." Of course, it is not contended that any such principle as this enters into the consideration of the case at bar. Here the entire property had an existence at the time the mortgage upon it was executed, and instead of its value having been increased, it is but natural to suppose that with the

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lapse of time it had actually deteriorated. The equities of the case of *Farmers', etc., Co. v. Canada, etc., R. W. Co.*, *supra*, necessarily entered into the construction of the statute, and must be considered in connection with its language. That this is so is evident from the language of Elliott, J., who in the course of the opinion says: "That there is a natural difference between a case, such as this, where the railroad has not been built, and a case where the railroad has been constructed, is so evident that no one can fail to perceive it the instant his attention is directed to the matter."

Another case relied upon as giving sanction to the doctrine of "liberal construction" invoked by the majority is that of *Aurora Nat. Bank v. Black*, 129 Ind. 595. In that case, it is true, the general statement is made that such statutes should be liberally construed, and if this is any authority for injecting language into the statute which is not contained in it, then there is nothing further to be said. But it should not be forgotten that in the case just cited the statute we are now considering was not under construction, and that whatever was decided had reference to sections 5286-5288, Burns' R. S. 1894 (3999-4001, R. S. 1881), which in express terms give the employes of a corporation doing business in this State a prior lien upon the corporate property for the labor performed; and even there, the lien is given only from the date of employment, and is made superior only to other liens acquired or created subsequently to the date of such employment, the sections cited also providing the method of acquiring and the means of enforcing such liens.

In the case cited last, it was not held that the lien thus to be acquired is superior to all other liens, whether created before or after the date of the employment of the laborers, or that the statute contem-

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plated any rights not apparent on the face thereof. The point decided there was that the lien extended to property of the corporation acquired and transferred by it the day before it went into the hands of a receiver and after the performance of the labor for which the lien was asserted. This interpretation was just and reasonable, but it falls far short of supporting the position taken by the appellee in the present case, and sustained by the majority of this court.

Nor is there anything in the case of *State v. Aetna Life Ins. Co.*, 117 Ind. 251, that requires us to adopt the construction of the majority of the court in this case.

Every case and its language must be interpreted with reference to the question under consideration. If isolated expressions or dicta of the judges can be used as authority for the establishment of such extraordinary doctrines as are declared in the prevailing opinion in the case before us, then there is no longer any security in a mortgage and other honestly acquired liens, and the only remedy is in dealing exclusively upon a cash basis. In the case last cited, however, it is expressly declared that the statute itself must determine the character and extent of the lien, although the intention to make it paramount might be gathered from the general words and purposes of such statute. If there is anything in the general language or in the purpose of the statute now under construction indicating that the employe's lien should reach back nine months, or to any indefinite period however remote, and supplant the lawfully acquired claims and rights of mortgagees or other lien holders, I have failed to perceive it. It was further expressly held, in the case last referred to, that the statute then in consideration did not contain any provision evincing an intention to make a preexisting mortgage lien subordinate to that of an assessment for benefits arising from the con-

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struction of a ditch, and that without such a provision the court could not give the statute that construction. Just what language would be sufficient to manifest such an intention is not stated, nor do I believe that the mere fact that the claim for which a preference is asserted is that of a laborer or employe, will of itself give it such preference.

In *Warren v. Sohn*, 112 Ind. 213, the court but gave effect to the words of the statute giving miners who are employed in performing labor in mines a paramount lien over those of all other claimants except for taxes. I am not now disputing the proposition that a statute might not by its terms give the kind of a preference claimed in the present case, but what I do insist upon is that the law under construction does not give it.

When a lien is purely statutory, as is that claimed here, if any there be, it exists and must be controlled solely by the statute. *Cook v. State*, 101 Ind. 446; *Hanch v. Ripley*, 127 Ind. 151; Jones on Liens, section 105.

Even a mechanic's or materialman's lien only attaches as of the date when the mechanic first performs any labor or the materialman furnishes any material, and a preexisting mortgage lien cannot be subordinated to a mechanic's or materialman's lien so far as the realty is concerned upon which the building is erected which was placed there by the work of the mechanic, and in which the materials furnished are contained. As to the building itself, the lien is, of course, superior, and justly so, for the obvious reason that the labor and material have made the building what it is.

It is indeed difficult to discover any equity in the claim of appellee as compared with the right of the appellant or his grantor. When the appellee rendered

the services for which he asserts the lien in question, he had constructive notice of the mortgage and was bound by it, and must be presumed to have acted in view of such knowledge. Had the appellant's lien been contemporaneous with that of appellee, the case might be different, of course.

If the majority opinion is right, there is not a chattel in Indiana upon which it would be safe to take a mortgage for purchase money or any other debt; for who knows how soon the owner and his vendee may choose to put it to a use which will bring it within the operation of this statute and by reason of which any number of labor liens may attach to it? Nor am I able to perceive the force of the suggestion that the amount to which the laborer's lien is limited makes the right given a less dangerous one, for although the amount of one man's claim for labor is limited to \$50.00, the number of claimants who may assert such a lien is as limitless as the sands of the sea.

It will not render the statute more just, nor improve the value of vested securities thus stricken down, to say that the mortgagee, or other lienholder besides the laborer, can take notice of the existence of this law at the time the security is taken. The property may certainly be put to uses in the future, of which at the time the security was accepted there was not the remotest indication nor prospect, and to say that whenever a chattel mortgage or other lien is given to secure a debt the lienholder must anticipate such extraordinary contingencies is, as it appears to me and as I think I have shown, to strike down vested rights and securities, and to inaugurate a system by which creditors will be driven to resort to other means of securing themselves than by those, or at least a portion of those, which have always existed for his benefit in the commercial and business world.

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It must be remembered, too, that the lien here awarded the appellee, and for which a superiority is given over an older and naturally superior lien, attaches without any notice being given to hold the same upon the public records, and without a record of any kind being made thereof.

Moreover, if the lien here given is preferred to every other lien, there is nothing to hinder it from being preferred to a tax lien, and the State, county and municipality will all be superseded in their claims by the operation of this extraordinary statute. That the legislature has the power to enact such a law may be true, but I feel confident it has not done so in this particular instance.

For these reasons, among many others that might be mentioned, I cannot bring myself to agree with the prevailing opinion as to the meaning given this statute.

Ross, J., concurs in the views expressed in the dissenting opinion of Reinhard, J.

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[No. 2,013. Filed June 10, 1896. Rehearing denied October 14, 1896.]

INSURANCE.—*Construction of Policy.*—*Payment of Premium.*—A provision in an insurance policy that where a note is given for the premium and the same is not paid within thirty days after it becomes due the policy shall be void until the note is paid, is not applicable where no note is given and the insured is given a reasonable time in which to pay the premium. *p. 208.*

PLEADING.—*Action Against a Foreign Insurance Company.*—*Jurisdiction.*—The question of jurisdiction of the court in an action on a policy of insurance issued by a foreign insurance company, brought in the county in which the company had an agent, other than the county in which the plaintiff and the agent issuing the

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policy resided, can only be raised by a special plea alleging such facts as are necessary to raise that issue. pp. 210, 211.

PLEADING.—*Action on Insurance Policy.—Complaint.*—In an action on an insurance policy a complaint alleging that the policy was executed and delivered to plaintiff in consideration of a specified amount as a premium, is sufficient without alleging a payment or an agreement to pay anything, as it is immaterial whether the premium was paid in cash or whether a credit was given for the same. p. 211.

INSURANCE.—*Failure to Pay Premium at Time Fixed.*—The failure of assured to pay the premium on an insurance policy within a definite and fixed time does not work a forfeiture of the policy in the absence of any stipulation to that effect in the policy. p. 212.

From the Marshall Circuit Court. *Affirmed.*

J. D. McLaren, for appellant.

E. C. Martindale and *S. N. Stevens*, for appellee.

REINHARD, J.—Appellee sued and recovered judgment against appellant in the court below on a fire insurance policy on certain personal property, situated in the city of Hammond, in this State. At the time this policy was written the agent wrote another on a house owned by appellee, in said city of Hammond. The personal property destroyed and covered by the policy in suit was not contained in said house, but in a rented dwelling occupied by her, she having leased her own to others. The policies were written June 18, 1892, but not delivered until August 22, 1892, the agent having held them that long, it is claimed, so as to enable the appellee to procure the money with which to pay the premiums. The policy in suit was for one year, from June 18, 1892, and the property was burned January 18, 1893. The premium on this policy was \$9.00, and on the policy covering the house \$12.00. At the time of the delivery of the policies, the appellee paid the agent \$10.00 on account of the premiums of both policies. Appellant claims and the agent testified that it was agreed that inasmuch as appellee

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was unable to carry both policies, that the one on the personal goods should be canceled at once, and that appellee agreed to send it to the agent's office to be officially canceled, but that she neglected to do so. The remainder of the premium was never paid, but soon after the fire and after said property had been destroyed, the appellee sent the remaining premium due on both policies to the agent, but he would not receive it, having knowledge of the loss.

The appellee's version as to the matter of unpaid premiums of the two policies is that the agent credited her for the part still remaining due after the payment of the \$10.00, saying at the time that she might pay it whenever she could, or whenever it was convenient for her to do so.

The appellee testified that at the time she paid the agent the \$10.00 she told him she wanted the amount applied on the policy on the house, and that he told her she could keep both of the policies and pay the balance whenever she had the money. The appellant's agent, who took the insurance, testified that the appellee did not pay anything on the policy in suit, but owed the full amount thereon, \$9.00. There was no other evidence upon the subject.

It is, therefore, the undisputed evidence that no portion of the premium of the policy in suit had been paid when the policy was delivered, and that \$10.00 of the premium was then paid on the two policies, leaving a balance of \$11.00 still due, \$9.00 of which was payable on the policy in suit. The appellee claims that the agent gave her time to pay this balance as long as she wanted; the agent testifies that no time was given her, but that the policy (on the furniture) was to be canceled. This appears to be the point of dispute between the parties, but it does not seem to us that it is

material whether the appellant or the appellee is right in this contention.

There was no clause in the policy providing for a forfeiture in case the premium remained unpaid for any certain period, or was not paid in cash. The only provision relating to a forfeiture is that where a note is given for the premium and the same is not paid within thirty days after it becomes due, the policy shall be void until the note is paid, etc. As there was no note given in this case, the above provision cannot be made applicable.

We know of no reason for holding that an insurance company may not sell insurance on a credit. If the company, through its agent, accepted the insurance with the agreement that appellee should have a reasonable time in which to pay the remainder of the premium, the policy did not become forfeited by reason of the nonpayment of such premium. The unpaid premium then simply became a debt due from the appellee to the appellant, to be collected like any other debt. There being evidence to sustain appellee's theory of the transaction, we cannot reverse the judgment on account of a failure of proof on the subject of the payment of the premiums.

The appellant argues that this case is governed by the law as declared in *Continental Ins. Co. v. Dorman*, 125 Ind. 189. But in that case a note was given for the premium, and the policy expressly provided that in case of failure to pay the note at maturity the policy should be void while the note remained unpaid. It was attempted to show that the note was taken in absolute payment of the premium, and it was held that this was no excuse for failure to pay the note, inasmuch as such an agreement would be in plain contravention of the terms of the written contract and hence void. No such case is here presented.

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The appellant vigorously assails the jury's answers to the interrogatories propounded to them, and it must be confessed, they, or some of them, at least, are singularly repugnant to the positive and uncontradicted evidence. Thus it is found by the jury that the appellee paid the premium, or part thereof, on the policy in suit, when it is practically admitted by her that the payment of \$10.00 made by her was on the other policy. More remarkable still is the finding that neither the appellee nor her brother for her offered to pay the balance of the premium still due on the two policies to the appellant's agent at Hammond, Indiana, after the goods had been burned, and that said agent did not refuse to accept the same. On this subject the appellee testified without equivocation that either on the day of the fire or afterwards she sent the money by her brother to appellant's agent, Knotts, to pay the balance due on both the policies, while Knotts stated in his deposition that appellee's brother, after the fire, tendered him either \$9.00 or \$11.00 on these policies, which he refused to receive. There was no testimony in contradiction of this statement. Hence it is difficult to understand just where the jury obtained the testimony upon which they based their answer that no such tender had been made after the fire.

Again, the jury found that the premium for the policy in suit was paid to the appellant by Knotts on or before his final settlement with said appellant. Of this there is no evidence. The fact that Knotts testified that he owed the company nothing did not warrant the jury in finding that he had paid over to the company the premium due from appellee, in the absence of some testimony to that effect.

We do not think, however, that the determination of this case depends in any degree upon the truth or

falsity of these answers to the interrogatories. If the policy in suit was delivered to the appellee under the agreement that the latter should pay the balance of the premium when it was convenient, or within a reasonable time, it was an agreement which the parties had the power to make, and the policy would not be forfeited in the absence of a clause to that effect in the contract. Hence it would be wholly immaterial whether the appellant received the premium or not, or whether any tender of the balance was made after the fire, or before, for that matter. The answers to the interrogatories are therefore not inconsistent with the general verdict.

We have examined the evidence concerning the question of proof of loss, and our conclusion is that if no such proof was made it was waived by the appellant in denying liability upon other grounds.

There was no error in giving instruction one, two and three, requested by appellee.

We find no reversible error in the overruling of the motion for a new trial.

Error is predicated upon the overruling of the appellant's demurrer to the complaint. The grounds of objection are (1) that the court has not jurisdiction of the person of the defendant, or of the subject-matter of the action, and (2) that the complaint does not state facts sufficient to constitute a cause of action.

It is alleged in the complaint that the appellant was a foreign corporation, doing business in this State in 1892. The policy filed with the complaint shows that the property insured and burned was situated in the city of Hammond, State of Indiana, and it appears from the pleading under consideration that the agent who issued the policy, as well as the insured, resided in said city. From these facts it is contended by appellant's counsel that the action is local and can only

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be brought in the county in which the city of Hammond is located, and not in the county of Marshall, where this action was commenced.

Section 4915, Burns' R. S. 1894 (3765, R. S. 1881), prescribes the terms upon which foreign insurance companies may transact business in this State. It is argued that the compliance with this section of the statute, which must be presumed, fixes the legal residence of such company in the county in which this particular agency is located, and that suits must be brought against the company, if at all, in such county.

Section 313, Burns' R. S. 1894, authorizes the bringing of any action against a corporation in any county in which it has an office for the transaction of business. *Evansville, etc., R. R. Co. v. Spellbring*, 1 Ind. App. 167. It is averred in the complaint that there was at the time of the bringing of this action a duly authorized and acting agent in Marshall county, where the action was instituted.

By section 4916, R. S. 1894, process may be served upon the agent of any foreign insurance company in any county in the State where consent has been entered of record. But conceding without deciding that under the circumstances of the present case the action must be instituted in the county in which the insurance was contracted for and the loss occurred, if at the time of the suit there be an agent in such county, we do not think it appears anywhere that there was such agency in said county at the time of the commencement of this action. If the appellant desired to present the question of jurisdiction it should have filed its proper plea averring such facts as are necessary to raise that issue.

It is further insisted that the complaint is insufficient because it fails to aver that the appellee paid, or agreed to pay anything for the policy. The complaint

does aver, however, that the policy was executed and delivered to the appellee in consideration of the sum of \$9.00 as a premium. It is immaterial, as we have already shown, whether the premium was paid in cash or whether a credit was given for the same. There is no stipulation in the policy that the contract shall be void upon failure to pay the premium in cash or to give a note for the same. Besides, there is an averment that all the conditions in said contract have been fulfilled by the appellee.

The demurrer to the complaint was correctly overruled.

The overruling of the appellant's demurrer to the second paragraph of appellee's reply is assigned as error.

Each of the paragraphs to which the reply was addressed avers that the delivery of the policy and the extension given thereon was without consideration. The reply demurred to sets forth the facts relied upon in full and alleges that a certain amount of money was paid upon the two policies mentioned, and time was given for the balance. It also avers that more than enough was paid in money to cover the premium on the policy in suit. This reply is not a departure from the complaint. The court did not err in overruling the demurrer to the pleading under the circumstances.

We find no reversible error.

The judgment is, therefore, affirmed.

ON PETITION FOR REHEARING.

REINHARD, J.—Appellant's counsel insists in his brief on petition for rehearing that "the court erred in holding, as it did in effect, that the promise of the appellee to pay the required premium for the policy

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within a definite period of time and that her failing to pay within that time, and before the loss occurred, were not a complete bar to her recovery, as the appellant infers from the language of the court, that there was no express clause in the policy that it should be forfeited for such nonpayment." "Such a rule," appellant's counsel say, "antagonizes every sense of justice and common honesty, as well as the general rules of law."

Assuming for the present that there was a promise on the part of the appellee to pay the premium within a definite and fixed time, it by no means follows that the non-payment of the premium within such time works a forfeiture, in the absence of any stipulation to that effect in the policy.

"If, however, the policy contains no such proviso [a proviso of forfeiture for non-payment of premium], though the charter and by-laws require the payment of annual premiums, the non-payment of annual premium when due does not work a forfeiture. Such a policy insures for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid." 2 May, Insurance, section 343.

It is a most familiar principle of the law of insurance that forfeitures are not favored, and even where it is attempted to insert a forfeiture clause, unless the language is clear and the failure to comply with the condition equally so, the courts will not declare a forfeiture and they will never construe a forfeiture by mere intendment. *Bowlus v. Phenix Ins. Co.* 133 Ind. 106, 20 L. R. A. 400; *Home Ins. Co. v. Marple*, 1 Ind. App. 411; *Farmers' Mutual, etc., Ass'n v. Koontz*, 4 Ind. App. 538. Such provisions will always be strictly construed so as to avert a forfeiture. *Continental Ins. Co.*

v. *Vanlue*, 126 Ind. 410; *Sweetser v. Odd Fellows, etc., Ass'n*, 117 Ind. 97; *Phenix Ins. Ass'n v. Lorenz*, 7 Ind. App. 266.

The appellant not only asks us to reverse the rule as to strict construction, but to read into the policy a proviso of forfeiture for the non-payment of the premium when no such condition is contained therein. This we cannot do. We are powerless to make a new contract for the parties in an insurance case, as much as in any other kind of a contract. If the company desired such a clause or provision in the policy, it was easy enough to place it there in express terms. Having failed to do so we cannot undertake to insert it by arbitrary construction.

It is all well enough to speak about the "injustice" of a decision which allows a party to collect a loss without paying the premium. But we are not concerned with abstract notions of justice and right. The law deems it just and right to hold the parties to their contracts. They can easily protect themselves by inserting such stipulations as they may regard as necessary, and if they fail in this they have no one to censure for it but themselves.

Counsel for appellant says there was no consideration for the policy. We have yet to learn that a promise to pay a certain and definite amount of premium is not a sufficient consideration for the risk involved in a policy of fire insurance. The illustration of counsel is not an apt one. He says: "Suppose A. gives B. his non-negotiable note for \$100.00 payable 90 days after date for a horse to be delivered to A. in ten days after the execution of the note: B. fails to deliver the horse and never does deliver him until the note matures, and then he offers to deliver the horse, but A. declines to accept him, and B. sues upon the note, and A. pleads want and failure of considera-

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tion, setting out the facts fully. Now there is no express stipulation in the note that it shall be forfeited or non-collectible if the horse is not delivered within the ten days, but would not A.'s defense, if sustained by competent evidence, bar B.'s recovery upon the note?"

The all-sufficient answer to the question of the learned counsel is that we have here no such case as he supposes. If B. had sold to A. a horse on a credit of thirty days, delivering the horse to make the sale complete, and (whether A. had given a note for the horse or not) failed to pay the debt when due, then we would have just such a case as the appellant insists is made by the evidence in the case at bar. The appellant, by its agent, sold and delivered to the appellee an insurance policy and the appellee promised (according to appellant's version of the facts) to pay the premium in thirty days, but failed to do so. Now what is the appellant's remedy? Certainly there is no forfeiture of the policy any more than there would be a forfeiture of A's right to retain the title to the horse. In both instances the party to whom the money is owing must look to the debtor for payment as in the case of any other ordinary debt. He can sue the debtor whenever the debt matures and recover judgment against him.

In the case at bar, if the appellant's version of the facts is correct, the policy was in force the moment the agent delivered it to the appellee. Had the property been burned the next day or the next hour, without the fault of the appellee, the appellant would have been liable. The promise to pay the premium, expressed or implied, renders the contract operative. Now if the failure to pay in thirty days or at any time makes the contract void, it must be by reason of some clear and unequivocal provision to that effect in the

contract itself. There is no such provision in the contract under consideration.

Appellant's counsel says there is no substantial disagreement in the testimony of Knotts, the appellant's agent, and that of the appellee "that the policy in suit was delivered to appellee upon her express promise to pay the premium upon her return from Argos, and she says she did not pay it." Counsel also insists that the question of whether or not the policy in suit was canceled at the time of the payment of the \$10.00 "was not the main and controlling point in the case." If this be true, then the defense of no consideration or failure of consideration cannot stand for a moment. If there was a delivery of the policy in suit, and no cancellation of the same, as appellant's counsel now seems to concede, and as the appellee certainly testified, then the promise to pay within thirty days, if there was such a promise, or the implied promise to pay within a reasonable time, if there was no express promise to pay within a definite time, was a legal and sufficient consideration for the undertaking of the appellant to insure the appellee's property against loss by fire. Had there been a cancellation of the policy, or an agreement to cancel, then the obligation of the appellant to carry the insurance would have ceased with the liability of the appellee to pay the appellant for the premium. The liability of the appellee continued until there was an actual payment by her of the premium, but the failure to pay the latter did not operate to forfeit the policy, in the absence of an express condition in that instrument, that the policy could be collected only in case the premium had been paid; hence, if the learned counsel is correct in saying that this court "mistakes the evidence of the agent Knotts" when it says that he testified that no time was given her, his defense has a more feeble

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foundation to stand upon than we had supposed; for if time was actually given the appellee in which the premium was to be paid, it strengthens the claim that the insurance was sold on a credit and that no agreement was made by which the policy in suit was to be canceled because the appellee was unable or unwilling to pay the premium thereon.

We still think, however, after a careful review of the evidence, that the construction placed upon it in our former opinion is the correct one. When we stated that Knotts, the agent, testified that no time was given the appellee in which to pay the premium on the policy in suit, but that the same was to be canceled, we had reference, of course to what took place at the time of the payment of the \$10.00 and concerning the balance due for premiums. If Knotts did not intend to convey the impression that there was no agreement to give the appellee time to pay the balance of the premium on the policy covering the furniture, there could be no point in the claim that said policy was to be canceled, for to admit that the contract remained in force on this policy after the payment of the \$10.00, is a concession of the appellee's entire contention. Knotts testified that the \$10.00 was on the premium of the policy on the house, and not of the policy in suit, which latter policy was by the agreement of the appellee then and there made of no effect and was to be surrendered and canceled. If that was true there could certainly have been no agreement to extend the time for the payment of this balance for thirty days or any other period. Knotts fortifies his claim that this policy was to be canceled by the further statement that he went to the appellee's house two or three times to take up the policy, but did not find her at home. The appellee, on the other hand, testified that while it was her intention at first to take

only one of the policies, Knotts told her, "no, if you want to take the two policies take them and keep them until I come back," and that she replied, "all right, I will take them and hand you the money when I come back." She says she went to Argos to see her mother who was sick and then paid him the \$10.00, after she had been to Argos, and took a receipt for it; and that she took the policies on the second day of August and came back from Argos and paid him the money when the receipt was given. The receipt bears date "Hammond, Ind., 8, 22, '92." She says that after that she did not see Knotts any more until after the fire. It is true that in another part of her examination she also stated that this receipt was given when the policies were delivered, but this statement she afterward corrected by saying that she paid the money after she returned from Argos, and it was for the jury to decide which of her statements was the true one. As to the balance of the premiums she stated that "there was no agreement about it, he said I could pay it at some other time," that nothing was said as to where or when the balance was to be paid, and that there was no agreement that the policy was to be canceled. She also said that she went to Argos twice and that when she came back from Argos (whether the first or second time she failed to state) she had plenty of money to pay the premiums, and sent Knotts word to that effect in November, but did not know whether he received the information or not. She admitted that she told Knotts, when she paid him the \$10.00, that she wanted that applied on the policy on the house, but that he told her she could keep both policies, and in answer to the question of appellant's counsel whether she paid the \$2.00 on the other policy, she said, "No, sir, I owe the \$2.00 yet, I owe \$11.00 on the two policies."

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It must be admitted, we think, that her testimony is somewhat vague and indefinite, but it is our duty to construe it most favorably to the appellee, as the jury had the right to construe it.

And so we think we are amply justified in saying, as we did in our former opinion, that as to the extension of time for the unpaid balance of the premiums of the two policies, the appellee testified that the agent credited her for the part remaining unpaid upon both policies, saying that she might pay it when it was convenient, while the agent testified that there was no such agreement for the extension of time as to the balance due on the policy in suit, but that it was agreed that it should be canceled. We cannot agree with counsel that appellee admitted that she paid the \$10.00 on the other policy. On the contrary, she stated that while that was her desire at first, Knotts told her to keep both policies and that she paid the \$10.00 on both.

As we said in the former opinion, it is immaterial to the correct determination of this case whether the appellee's version or that of Knotts was absolutely correct. The jury had the undoubted right to believe the appellee's statement that she paid the \$10.00 on both policies and owed a balance on both, and that, as to such balance, Knotts gave her further time for payment, and that the policy in suit was not to be canceled but remained in force. If this statement be true, then, in the absence of a forfeiture clause in the policy, the appellant is liable to her for the insurance.

Even if the appellant's counsel is correct in his contention that the undisputed evidence shows that when Knotts delivered the policy in suit to the appellee she agreed to pay the premium on it when she returned from the visit to her mother, it will not help this case. The moment the policy was delivered to the

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appellee, upon such a promise by her, the contract of insurance was in force, and it remained so during the entire period covered by the policy, unless there was in the contract a provision of forfeiture for nonpayment of the premium. If this doctrine is an unjust and dangerous one, as counsel insists it is, the injustice and injurious consequences must be laid at the door of other courts than this, for as we have shown by the authorities cited, we are only following a rule that has long been established.

The case cited by counsel in support of the proposition that it was not incumbent on the agent in order to render the policy effectual to urge the payment of the premium, is not an authority in his favor. *Union Central Life Ins. Co. v. Pauly*, 8 Ind. App. 85. In that case there had been no delivery of the policy as in the case at bar. Here the delivery of the policy did render it effectual, and the arrangement between the agent and the insured as to the payment of the premium in future simply created an indebtedness to the company on the part of the appellee. There was in the present case no agreement that the policy should not become operative until the premium was paid.

Counsel for appellant again argues the question of jurisdiction, but we think we covered the ground on that point sufficiently in what we said in the original opinion. We have not been able to come to any different conclusion upon that question than the one at which we arrived upon the former consideration of the case.

Petition overruled.

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LOUFER v. STOTTELMYER.

[No. 2,083. Filed October 15, 1896.]

PLEADING.—*Defect of Parties.*—*Demurrer.*—A demurrer for want of facts does not raise any question as to defect of parties.

SAME.—*Defect of Parties.*—*Waiver.*—A defect of parties if apparent on the face of the pleadings is waived upon failure to demur on that ground.

DAMAGES.—*Action by Lessee Against Lessor.*—*Complaint.*—A complaint by lessee against a lessor for damages for failure to deliver possession of a farm need not allege that the defendant is the owner of the land, nor that plaintiff had complied with his part of the contract, if the complaint shows that plaintiff was unable to perform his part of the contract by defendant's wrong in keeping him from such performance.

From the Madison Circuit Court. *Affirmed.*

William A. Kittinger and *Edward D. Reardon*,
for appellant.

Francis A. Walker and *Frank P. Foster*, for ap-
pellee.

REINHARD, J.—Appellee alleges in his complaint that on the 28th day of August, 1893, the appellant, by lease in writing, a copy of which is herewith filed, leased to the appellee certain described farm land in Madison county, Indiana, for the term of one year from March 1, 1894; that according to the terms of the lease the appellee, in September, 1893, went upon said lands and sowed thereon thirty acres of wheat, taking with him his machinery, farming implements and grain and feed for stock, depositing the same on said farm; that on or about the 1st day of March, 1894, he demanded of the appellant the possession of said farm, according to the terms of the lease, but that appellant refused to deliver the same to him or any

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part thereof, and excluded him from said land, including the part sowed in wheat; that said real estate had valuable fruit growing thereon and was in a good state of cultivation for farming purposes; that at the time he was so refused possession of said real estate all the farms and real estate held for lease had been leased and taken up by other parties, and appellee was not able to secure any other farm or real estate to till and occupy, although he made diligent search and inquiry for that purpose; that appellee had stock and farming implements and grain, and on account of the matter complained of he had no place where the same could be stored and cared for by reason whereof he was compelled to sell and dispose of the same at a great loss and sacrifice, besides being at great expense in moving and securing a place to store his said property; that being unable to secure any land to till and being thus deprived of his work and labor and of the occupation, use, rents, income and profits of said real estate, by reason of the facts aforesaid, he has been damaged \$500.00 for which he asks judgment.

The lease stipulates that John A. Loufer and Anna M. Loufer agree to rent their farm in Greene township, Madison county, Indiana, to John H. Stottlemeyer for one year from March 1, 1894, and to give him possession thereof on or before the date last named. Stottlemeyer is to sow wheat on said farm in September, 1893, and he agrees to let the tenant who may succeed him sow wheat in September before his time expires in March. He is to give the other parties to the contract one-half the corn and wheat and other grain raised on the farm either to be placed in granaries or delivered at Alfont; also one-half of the fruit and everything raised on the farm except what grows in the garden. Stottlemeyer is to keep the fences in as good repair as they are when he takes possession of

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the farm, and if any new fences are to be made the other parties are to make them or pay him for so doing. Stottlemeyer is to keep all manure hauled on the fields and not to allow it to lie around the stables and old strawstacks. The articles of agreement was dated and signed by the parties on the 28th day of August, 1893.

The appellant demurred to the complaint and as ground of demurrer specified that the same does not state facts sufficiently to constitute a cause of action. The demurrer was overruled and the appellant insists that this was error.

It is urged that the complaint is fatally defective because it shows that the lease was executed on the one hand by the appellant and her husband and that the latter was not made a party to this action.

If it was necessary to join the appellant's husband as a party, and this was not done, the omission would constitute a defect of parties. *Barnett v. Leonard*, 66 Ind. 422. Defect of parties, however, is a separate and distinct cause for demurrer, and a demurrer for want of facts does not raise any question as to parties. Section 342, Burns' R. S. 1894 (339, R. S. 1881); *Collins v. Nave*, 9 Ind. 209; *Greensburg, etc., Turnpike Co. v. Sidener*, 40 Ind. 424; *Leedy v. Nash*, 67 Ind. 311. The appellant having failed to demur on the ground of defect of parties, if such defect appears on the face of the pleadings, the point is waived. *Groves v. Ruby*, 24 Ind. 418; *Bray v. Black*, 57 Ind. 417; *Thomas v. Wood*, 61 Ind. 132; *Atkinson v. Mott*, 102 Ind. 431; *Browning v. Smith*, 139 Ind. 280.

The complaint sufficiently shows, we think, that the relation of landlord and tenant subsisted between the parties; that appellant refused to deliver possession of the farm when appellee demanded it and thus kept him out of possession. It was not necessary to aver

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that appellant was the owner of the land, nor that appellee had complied with his portion of the contract. It was plainly enough shown that appellee could not perform his part of the agreement because of appellant's wrong of keeping him from such performance. The complaint, though perhaps not a model of good pleading, is sufficient to withstand the demurrer.

Error is assigned in overruling appellant's motion for a new trial.

There is evidence to sustain the verdict on all material points.

Objection was made and exceptions were taken to certain testimony introduced as to the measure of damages and as to instructions given upon that point. We have considered these rulings and are satisfied that no substantial error was committed in this respect. The measure of damages in such cases as this is correctly laid down in the case of *Chew v. Lucas*, 15 Ind. App. 595, and the rule as there declared was not departed from by the court in any material respect.

Upon the whole case a correct result appears to have been reached.

Judgment affirmed.

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[No. 2,186. Filed October 15, 1896.]

HIGHWAYS.—Vacation of.—Assessment of Damages.—Appeal.—Waiver.—The failure of the petitioners for the vacation of a highway to move the board of commissioners to set aside the report of reviewers assessing damages, and appoint a new set of reviewers, does not waive the objections to the report and preclude the right of appeal to the circuit court.

SAME.—Vacation of.—Abutting Landowner.—Remonstrance.—Statute Construed.—The owner of land abutting on a highway at the

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point of intersection by another highway that is sought to be vacated, is not an owner of land through which the highway sought to be vacated passes, within the meaning of section 6746, Burns' R. S. 1894, giving right to remonstrate for damages.

From the Marion Circuit Court. *Affirmed.*

Henry Warrum and S. E. Urmston, for appellant.

James B. Black and Charles G. Offutt, for appellees.

LOTZ, J.—This cause was transferred to this court by order of the Supreme Court.

The appellees petitioned the board of commissioners of Hancock county to vacate a certain highway; said highway being situated wholly within that county. After the appointment of viewers and the filing of their report favorable to such vacation, the appellant filed a remonstrance on the ground that the vacation would not be of public utility; and on the ground that he would sustain damages by such vacation. Reviewers were appointed who reported in favor of the utility of the proposed vacation and of damages to appellant in the sum of \$150.00. The board entered a final order vacating the road and requiring the appellees, the petitioners, to pay to the appellant the damages assessed. The petitioners appealed to the circuit court of Hancock county from the award of damages and the remonstrant appealed from the order vacating the road. The venue was changed to the court below. A trial resulted in a finding and a judgment vacating the road and without awarding the appellant any damages.

The action of the Marion Circuit Court in overruling the appellant's motion to dismiss the appeal, and appellant's motion for a new trial are the only errors assigned.

The basis for appellant's motion to dismiss appel-
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lees' appeal is that the petitioners failed to move the board to set aside the report of the reviewers assessing damages for the purpose of having the board appoint a new set of reviewers to assess the damages. It is contended that the failure to make such motion was a waiver of all objections to the report and that therefore, no question could be properly presented as to the damages in the circuit court.

Many authorities are cited to the effect that it is only such questions as were properly raised and put in issue before the board that can be tried and determined on appeal to the circuit court. It is insisted that as no objection was made in the commissioners court to the report of the reviewers assessing damages in favor of the remonstrant, that none can be raised in the circuit court and that it follows that appellant's motion to dismiss should have been sustained.

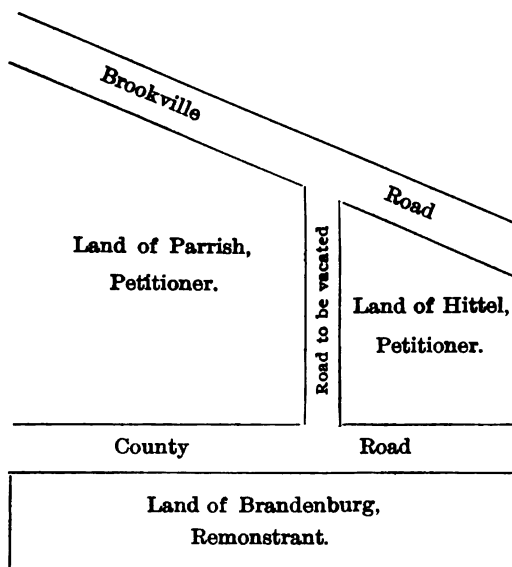
Whilst it is true that the board may, when it is made to appear that the damages are unreasonable, set aside the assessment and order another review, section 6749, Burns' R. S. 1894 (5022, R. S. 1881), it is not contemplated that the aggrieved party must object to the assessment and pray for another review. The authorities cited are not in point because the report of the reviewers does not form any issue in the case; but upon appeal such report is vacated and set aside as the direct effect of the appeal, and in the circuit court the question of damages is tried *de novo*, *Turley v. Oldham*, 68 Ind. 114; *Thayer v. Burger*, 100 Ind. 262; *Clift v. Brown*, 95 Ind. 53. The issue to be tried is made by the remonstrance and not by the report of the reviewers nor by any ruling the board might make in relation thereto.

There was no error in overruling this motion. On the trial of the cause in the circuit court the appellant

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proposed to prove the value of his lands with and without the road. The appellees objected to this evidence stating as one of the grounds of their objections that the road did not pass through appellant's lands, and for that reason he was not entitled to damages. This objection was sustained and a new trial was sought on account of such ruling.

The road sought to be vacated did not pass through the appellant's lands, nor did his lands abut thereon. The accompanying plat shows the relative position of the highway and of appellant's lands.



The statute relating to the location, vacation or change in a highway, when the same is wholly within one county provides that "If any person through whose land such highway or change may pass shall feel aggrieved thereby, such person may at any time before the final action of the board thereon set forth

such grievances by way of remonstrance," etc. Section 6746, Burns' R. S. 1894. This section relates to a remonstrance for damages only. A remonstrance for public utility is provided for in a subsequent section.

It will be seen that the section quoted limits the remonstrance to the person through whose lands the highway passes. It is true the highway proposed to be vacated intersects with another highway upon which appellant's lands abut; but it is not proposed to vacate any part of the latter highway. The appellant's lands lie directly south of the highway proposed to be vacated and a line projected south would pass over his lands; but this does not make him an abutting landowner. *House v. City of Greensburg*, 93 Ind. 533.

The appellant insists that the statute which provides for the change of a highway when it extends into two or more counties permits a remonstrance for damages by persons other than those over whose lands the highway passes when they are affected by the change. Section 6734, Burns' R. S. 1894. Whether or not such is the effect of that statute we need not determine. The statute under which this proceeding was instituted is a separate and distinct enactment from that relative to changes in highways when they extend into two or more counties. The proceeding is strictly statutory and only such persons as the statute has given the right can remonstrate for damages. As the highway proposed to be changed did not pass over appellant's lands and as his lands did not abut thereon he was not entitled to any damages at all. There was therefore no error in excluding the proposed testimony. It also appears from undisputed testimony that the appellant had no right to remonstrate for damages, and, therefore, had no standing in court. It is essential that it should ap-

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pear on the face of the remonstrance that the remonstrant has the statutory qualifications. "The reason is the same respecting things which do not appear as to those which do not exist." *Wells v. Rhodes*, 114 Ind. 467.

It conclusively appears that appellant did not have the statutory qualifications as a remonstrator for damages.

The judgment below was therefore right.

Judgment affirmed.

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[No. 1,623. Filed June 17, 1896. Rehearing denied October 16, 1896.]

BILLS AND NOTES.—*Note Given for a Patent Right, When Voidable.*—

A note given for a patent right which does not contain the words "given for a patent right" as required by section 8131, Burns' R. S. 1894 (6055, R. S. 1881), is not void, but voidable only. *p. 231.*

SAME.—*When Maker of Note is Estopped from Denying Validity.*

—The maker of a note is estopped from denying its validity as against one who purchased it for a valuable consideration on the faith of his assurance that the note was all right and that he would pay it. *p. 231.*

PLEADING.—*Answer, Immaterial Averments.*—*Proof.*—All allegations in an answer except those essential to constitute a good answer will be regarded as surplusage, and need not be proved. *p. 233.*

SAME.—*Practice.*—*Sustaining Demurrer to One Paragraph of Answer When Facts May be Proved Under Another.*—*Harmless Error.*—

It is harmless error to sustain a demurrer to a good paragraph of answer, where all the evidence admissible under it is admissible, and the defense is available under a remaining affirmative paragraph of answer.—*Ross and Reinhard, J.J. Dissenting. pp. 232-248.*

From the Noble Circuit Court. *Affirmed.*

H. G. Zimmerman, for appellant.

R. P. Barr, for appellees.

GAVIN, J.—This is an action brought by appellees against appellant upon a promissory note executed to one Brainard, payable to him or bearer at a bank in this State, which was duly assigned to appellees before maturity. Appellant filed an answer of six paragraphs. The third paragraph avers: That the consideration of the note was the sale and transfer to appellant and another of a certain patent right and that there was no clause or words in said note stating that the same was given for a patent right “by reason of which failure and omission said note was and is invalid and void.”

The 4th paragraph was identical in language with this save that it contained the added averment that appellees had at the time of their purchase of the note full knowledge of the facts above set out.

A demurrer was sustained to the 3d paragraph and overruled to the 4th.

Appellees replied by general denial and estoppel, arising from their having made the purchase of the note and paid its face therefor at appellant's request upon the faith of appellant's statement that it was valid and that he would pay it. Upon trial there was a general verdict in appellees' favor.

That the facts set forth in the 3d paragraph of answer constituted a good defense to the complaint is not and cannot be here controverted. The statute, section 8131, Burns' R. S. 1894 (6055, R. S. 1881), requires that such note shall contain the words, “Given for a patent right,” while section 8132, Burns' R. S. 1894 (6056, R. S. 1881), makes it a criminal offense to take or sell such a note without such clause. If the note does not contain the statement it is unenforceable between the parties, but if commercial paper, it is valid in the hands of an innocent holder for value. *New v. Walker*, 108 Ind. 365.

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It was not necessary that the answer allege appellees' knowledge. "Where the consideration of the note is illegal, or it is obtained from the maker by fraud the burden is upon the holder to show that he purchased it in good faith, without notice and in the usual course of business." *State Nat. Bank v. Bennett*, 8 Ind. App. 679, and the cases there cited.

The court correctly held that appellant could not assert his defense to the note if it was purchased by appellees for a valuable consideration upon the faith of his assurance to them that the note was all right and that he desired appellees to purchase the same and would pay it.

That the maker of the note is ordinarily estopped by such a promise is not disputed. *Plummer v. Bank of Mooresville*, 90 Ind. 386, and the cases there cited.

Appellant, however, insists that this note was void and that no estoppel can validate a void contract. One serious difficulty with this proposition is that the premise is not well founded. The statute does not in terms declare such contracts void. They are necessarily merely voidable, else they could not be sustained as commercial paper in the hands of innocent holders. The surety obligations of a married woman are by the statute declared void as to her, and therefore the courts declare them incapable of transfer and enforcement as commercial paper. *Voreis v. Nussbaum*, 131 Ind. 267. Yet, as therein shown, even married women may be estopped to assert their suretyship. *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301; *Rogers v. Union Cent., etc., Ins. Co.*, 111 Ind. 343; *Lane v. Schlemmer*, 114 Ind. 296, 5 Am. St. 621.

In New York it is held that an estoppel *in pais* can be urged to obviate the effect of an act which the statute declares void. *Payne v. Burnham*, 62 N. Y. 69; *Müller v. Zeimer*, 111 N. Y. 441.

We are not, however, called upon to go so far and decide more than is presented by the facts of this case, and that is, that this note was not void but voidable merely, as is established by the cases above referred to, holding that in the hands of an innocent purchaser it could be enforced as any other commercial paper duly transferred.

Counsel for appellees assert that while the third paragraph of answer was good, yet there was no harmful error in sustaining the demurrer thereto, because the fourth paragraph filed with it and left standing set up the same matters and was in legal effect the same, and because, under this fourth paragraph, all the evidence provable under the third was admissible, and the defense advanced by the third paragraph was available under the fourth. This contention must, in our judgment, be sustained. The principle thus declared was announced by the Supreme Court very early in the history of our State's jurisprudence and has been many times approved. If it is possible for a long line of decisions of the Supreme Court to settle a question of practice so that it should be regarded as closed and no longer open to dispute, the proposition must be deemed settled that where a demurrer is sustained to an answer, all the averments of which are included in another, under which the facts may be proved and the defense made available, then there is no reversible error in such ruling.

As we have seen, the third paragraph did contain a complete defense to the complaint without the averments of knowledge, while the fourth sets up the same facts with the additional and unnecessary averment of knowledge. Under the latter paragraph every material fact contained in the former was certainly provable because it was specifically averred therein, and

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its proof was absolutely essential to sustain that paragraph. Was not the defense set forth in the third paragraph available under the fourth?

If the appellant was, under the latter paragraph, entitled to prove these facts, as he most undeniably was, then was he not entitled upon making the proof to every benefit or advantage accruing therefrom? According to our holding the latter paragraph was not and could not be any better or stronger than the former. The former set up a complete defense. The other could do no more. It could not, by adding words or additional averments to that which was already a sufficient and complete defense, make of it more than this. The averment of knowledge was wholly unnecessary. Its presence made the pleading no better; its absence would have made it no worse. In legal force and effect the pleadings were the same. It is elementary law that it is not necessary, upon trial, that a party shall prove everything he may have alleged in his pleading. Whenever a defendant proves so many of the facts averred in his answer as will constitute in law the defense to the action he is entitled to recover thereon.

In this case, although appellant, in the fourth paragraph, alleged knowledge, he was not, in order to maintain the paragraph upon the trial, required to prove it, because the fact was immaterial and mere surplusage. "A second rule, which governs in the production of evidence, is, that *it is sufficient, if the substance of the issue be proved.*" 1 Greenleaf on Evidence, section 56. In this case, both paragraphs of the answer were good. The third paragraph contained an averment of all the material facts necessary to constitute a defense. The averment of knowledge in the fourth paragraph was matter in excess of what was

material and was therefore to that extent bad in form. The fourth paragraph was sufficient as a defense, but was vicious in containing surplusage. 18 Am. and Eng. Ency. of Law, p. 558. The allegation of a fact so wholly foreign and impertinent to the cause that no allegation whatever on the subject was necessary will be regarded as surplusage. 1 Saund. Pl. and Ev., p. 919; Bliss Code Pl., section 215. "As to immaterial averments, the rule is, that, if the whole of an averment may be struck out without destroying the right of action, it will not be necessary to prove it." 1 Saund. Pl. and Ev., p. 1091. "No proof is necessary as to such averments or parts of the issue as do not affect the grounds of the action or defense," 1 Saund. Pl. and Ev., p. 1090; 2 Rice Ev. 660. See also *Morris, Admr., v. Stern*, 80 Ind. 227, 231; *Miller, Admr., v. White River School Tp.*, 101 Ind. 503, 51 Am. Rep. 759. "All the allegations of fraud and misrepresentation we regard as having been mere surplusage and as having added nothing either to the force or effect of the paragraph." *Over v. City of Greenfield*, 107 Ind. 231; *Byard v. Harkrider*, 108 Ind. 376.

"It is true a plaintiff may allege more facts than are essential to constitute a cause of action, and in such case it is ordinarily held that he need only prove the substance of so many of them as constitute a cause of action to entitle him to recover and the balance of them may be regarded as immaterial, and surplusage." *Terre Haute, etc., R. R. Co. v. McCorkle*, 140 Ind. 613.

"It is only necessary for the plaintiff to prove so many of the facts alleged by him as amount to or constitute a cause of action." *Long v. Doxey*, 50 Ind. 385.

"It is sufficient if the substance of the issue is proved." *Bishop v. Redmond*, 83 Ind. 157.

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"It is only necessary for a plaintiff to prove as many of the facts alleged by him as amount to, or constitute, a cause of action." *St. Louis, etc., R. W. Co. v. Valirius*, 56 Ind. 511, 517.

"The appellants were not bound to prove every allegation of their complaint; it was sufficient if they established the substance of the issue." *Owen v. Phillips*, 73 Ind. 284, 293; *Phœnix, etc., Ins. Co. v. Hinesley*, 75 Ind. 1; *Standard Oil Co. v. Bowker*, 141 Ind. 12.

Where, as here, the defendant has an answer, standing under which he can prove his defense, if he does so prove it and the court refuses to give him the benefit of the defense so proven, then he may save his exceptions and resort to the appellate tribunal for relief. If, upon the trial, appellant was entitled under the fourth paragraph to prove his defense and then upon proof would have been entitled to a verdict, or if the facts had been specially found to conclusions and judgment in his favor (as in this case he clearly would have been) then the defense was in law available to him. The question of whether or not the defense was available under the fourth paragraph depends not on whether the trial judge thought it a good defense, but on whether or not it was in reality good and whether or not he was in law entitled to the benefit of it under the pleadings left standing.

The position has been assumed that "the error of sustaining a demurrer to a good paragraph of answer is harmless only when the same facts are available to the defendant under another paragraph of answer, and that they cannot be said to be available to him when besides such facts the court by its ruling on the demurrer declares that he must prove additional facts to make out his defense." The limitations of the general rule contained in the last clause upon which alone

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can any claim of harmful error be sustained is supported, it is true, by the case of *Bunting v. Mick*, 5 Ind. App. 289, but in so holding we are of opinion that the court was out of harmony with the adjudged cases and the principle established by the authorities hereinbefore and hereinafter cited, in that it applied to the sustaining of a demurrer to a good paragraph, the line of reasoning controlling the court in considering the effect of overruling a demurrer to a bad paragraph and gauged the effect of the ruling of the court where the answer stricken down was broader than that remaining by the result produced where the answer remaining was broader in its legal scope than that overthrown. The case of *Wilson v. Town of Monticello*, 85 Ind. 10, has been relied upon to sustain this contention. The error lies in adopting for this case a line of reasoning which was there applied to an altogether different state of the issues, and expressly held to be inapplicable to just the conditions presented here. There the plea remaining did *not* contain, in connection with other facts, the same facts as that stricken down, but the pleas stricken down involved the facts set up in the plea left standing and *others in addition thereto*. Thus the condition of things was just the reverse of what we have here. The court there said: "Where good answers are held bad on demurrer or are rejected on motion, the defendant is entitled to the benefit of the exception reserved upon the ruling, *unless there are others entitling him to put in evidence substantially the same matters as are pleaded in the answers held bad or rejected.*" (The italics are our own.) But the principle therein announced wholly overthrows, as it seems to us, the contention above mentioned and sustains the position we take. Here there was unquestionably another paragraph "entitling him to put in evidence" not only substantially, but

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precisely "the same matters pleaded in the answer held bad." The contingency therein contemplated is what occurs in this case.

Exactly the same statement of the law is made by Judge Howard in *Barnard v. Sherley*, 135 Ind. 547, 569, 41 Am. St. 454. "It is only when the allegations of a proper paragraph of pleading may be established by proof under other paragraphs that the sustaining of a demurrer to the paragraph in question will be held harmless." There, again, the pleading stricken down was broader than that left standing, and its facts not admissible thereunder, hence the harmfulness of the error because there was no pleading left, under which the facts in the former were provable or put in issue, and in the language of the court, "the appellant had no right to offer proof to sustain its allegations."

An effort has been made in this cause to make a distinction between cases where the answer remaining and under which the facts specially pleaded were admissible, is a general denial, and those where both answers are affirmative; no authority is given for the distinction, nor does any such appear in the cases passing upon this question of practice. If there be such a distinction well founded on principle, it seems somewhat remarkable that it has never been adverted to in the long line of decisions ranging from Blackford's Reports to the present time, and that it has not been noted by such eminent and careful law writers as Judge Elliott and Judge Works. Nor was it recognized by the Supreme Court in the recent case of *Wohlford v. Citizens Bldg., etc., Assn.*, 140 Ind. 662, where Judge Jordan says, "there was no error in sustaining the demurrer to the fifth paragraph of the answer, *
* * for the reason that appellant could avail him-

self of the same defense under other remaining paragraphs of his answer."

On principle we are unable to perceive wherein lies the distinction. If it be true, as asserted, that, although the facts are provable under another answer, they are not available where the other answer is broader, because, the court having adjudged the former insufficient, the pleader may rely upon this as a decision that he need not undertake to prove it under the broader answer, why does not the proposition apply where a defendant files with a general denial a special answer controverting some one material fact averred in the complaint? This answer would certainly be good. Why, then, if the court sustains a demurrer to it shall we not, must we not, under the logic of the contention, say that the trial judge has decided that although this material fact was successfully controverted, this would not be a defense, therefore, the defendant need not offer to dispute it under his general denial? By sustaining the demurrer has not the court in effect held that he must do more than disprove that one material fact?

Reference has been made to *Norris v. Tice*, 13 Ind. App. 17; *Shrum v. Town of Salem*, 13 Ind. App. 115; *Blue v. Briggs*, 12 Ind. App. 105, and *Kohli v. Hall*, 141 Ind. 411, as recent cases contravening our present holdings. We are wholly unable to discover wherein they tend to sustain that position which declares that the facts are not available under the pleading if the paragraph left contains more than the paragraph overthrown. *Blue v. Briggs*, *supra*, simply holds the error harmless because the facts were provable under the general denial. *Kohli v. Hall*, *supra*, contains not a word referring to any such modification of the general rule, but it applies this rule, and that, too, in a case where both answers are affirmative. Nor does

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Norris v. Tice, supra, in any way pretend to modify it. There the question presented and decided related to the overruling of a demurrer to a bad answer, not sustaining it to a good one, and the learned Judge Reinhard says: "There is a marked difference between overruling a demurrer to a bad answer and sustaining a demurrer to a good answer, the failure to observe which has led to great confusion in the decisions."

Quotation is then made with apparent approval from Elliott's App. Proced., 669: "In holding a defective paragraph good, the court adjudges that if the party by whom it is pleaded proves it he will be entitled to recover. No such thing is adjudged where a demurrer is sustained to one paragraph of several. It is true that it is adjudged that the paragraph is insufficient, *but no harm can result from such a ruling, if, in fact, no competent evidence is excluded, and it is not excluded if other paragraphs are left standing which entitle it to admission.*"

It seems to us that to hold otherwise than we do in this cause would but add to the confusion above referred to.

In *Shrum v. Town of Salem, supra*, the same learned judge, after holding the ruling harmless because the general denial was in, says: "For, if the same facts were admissible under another paragraph pleaded, the defendant can in no event be harmed by the ruling."

Again, effort is made to apply in this case the reasoning of the Supreme Court in *Flectwood v. Brown*, 109 Ind. 567, which is expressly stated to be applicable to cases just the opposite of this, it being there said: "The sustaining of a demurrer to a good paragraph of an answer, *when there is no other paragraph under which the same facts may be proven*, is, in effect, a

decision by the court," etc. That case seems to be relied upon, notwithstanding it is said in the opinion in so many words: "It is settled in this State, that the sustaining of a demurrer to a good paragraph of an answer will be a harmless error, if the defendant has another paragraph under which the same matters are admissible in evidence."

To show how thoroughly it has been established by the adjudications in this State that it is not harmful error to sustain a demurrer to an answer setting up a defense which is provable under another answer left standing, we quote from and review some other of the decided cases which, as we construe them, sustain this statement of the law.

The principle running through all these cases, where reference is made to any foundation principle, is that where the defense overthrown is provable under some paragraph left standing it is the duty of the party to present it under that paragraph and save his questions upon its sufficiency by ordinary methods. As we have already stated no distinction is made between cases where the answer remaining is a general denial or an affirmative pleading. In many cases affirmative matter is, by our code, made admissible under the general denial. Instances are, ejectment, quieting title, replevin, etc.

"The general issue was filed in this suit, and the defendant could, under that plea, have availed himself of the defense contained in his second special plea, and it must be presumed that he did so." *Shanklin v. Cooper*, 8 Blackf. 41.

"As the defense set up in those pleas could have been made under the general issue, and the evidence is not upon the record, we cannot reverse the judgment. If the defense set up in these pleas did not, in fact, exist, the defendant was not harmed, in the final result,

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by the decision on the demurrers. If the defense did exist, it should have been offered under the general issue, and if then rejected, and a bill of exceptions showed the fact, the error could be corrected here." *Davis v. Doe*, 2 Ind. 599, where the action was such that all defenses were admissible under the general denial.

In *Elliott v. Wright*, 7 Ind. 374, a demurrer was sustained to a special answer setting up facts showing a want of consideration, a general answer of want of consideration being also pleaded. The court says: "That he could have given all the special facts showing the want of consideration under the general paragraph, we have no doubt; that he should have done so, if the facts existed, is equally clear; and that he did so, according to all our late decisions, we must presume, as the contrary does not appear. This rule is as applicable to the new as it was to the old system of practice.

"It is founded on policy. A lawyer is an artful pleader. He fills his answer with paragraphs, the allegations in which he has no evidence to support; but the court, in the haste of *nisi prius* proceedings, as he anticipates, makes an erroneous ruling in regard to some of them, and the judgment against him is reversed, on that ground, in the Supreme Court, and the cause sent back for trial, when no trial is wanted, because no evidence to prove the allegations in the pleading exists.

"This abuse is partially prevented by requiring the party to offer his evidence below, and except, if it be rejected, wherever an issue exists under which it would be admissible."

"It is not the practice in this court to reverse a judgment otherwise correct, for an error in sustaining

a demurrer to a plea, or paragraph in the answer, if, as in this case, there is another issue upon the record under which the same evidence would be admissible." *Murphy v. Jones*, 7 Ind. 529.

The distinction between the harmfulness of error in overruling and sustaining demurrers was early recognized. In *Brookville, etc., Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768, referring to overruling a demurrer to a bad answer, Perkins, J., says: "This presents an entirely different case from that of erroneously sustaining a demurrer to a plea which, if held valid, the pleader would have to prove, and the facts set up in which, if existing, might be proved under other pleas held good."

To sustain the proposition that courts have made no distinction between answers of general denial and others, we call especial attention to some cases where both the answers considered were affirmative.

In *Terre Haute Gas Co. v. Teel*, 20 Ind. 131, it is said: "No injury could have resulted to the defendant from the ruling [sustaining a demurrer], as the same evidence was admissible under other paragraphs of said answer."

Likewise in *Stewart v. Anderson*, 59 Ind. 375, where the court says a ruling would be harmless even if erroneous "as all the evidence admissible under that paragraph was admissible, and admitted, under the second and third paragraphs."

Again, in *DeArmond v. Stoneman*, 63 Ind. 386, "all the evidence that could have been given, and relief had, under the first paragraph of answer, could have been given and had under the second."

So in *Johnson v. Putnam*, 95 Ind. 57, it is declared that no harm would have been done by sustaining a demurrer to certain paragraphs because "if they were sufficient, all the material allegations which they con-

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tain, that would be admissible in evidence upon a trial of the cause, * * * would be admissible under the second special paragraph of the answer."

Of similar tenor is *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45: "And as to the paragraph of the answer as a defense, we think all evidence that could have been given under it, would have been admissible under the other paragraphs of answer, and was, in fact, so far as it existed, admitted. The error, if error it was, in ruling upon this paragraph of answer, was a harmless one." Also in *Board, etc., v. Jameson*, 86 Ind. 154; *Moore v. Boyd*, 95 Ind. 134.

"We have in our reports a great variety of cases holding that where a demurrer has been erroneously sustained to a good paragraph of answer, where the matter pleaded could have been given in evidence under the general denial or *other paragraphs of the answer*, the error will be regarded as harmless." *Allis v. Nanson*, 41 Ind. 154, per Worden, J.

In the late case of *Butler v. Thornburg*, 131 Ind. 237, both answers were affirmative, but Miller, J., says: "We find upon examination, that all the evidence that could have been given to support the fourth paragraph of answer was admissible under other paragraphs, and the error, if such it was, in sustaining the demurrer to this paragraph, did not injure the appellant."

We now pass again to the general statement of the rule regardless of the character of the answer whether negative or affirmative.

"A defendant is not harmed by a ruling sustaining a demurrer to a paragraph of his answer, although it is good, if he has another paragraph under which the same matters are admissible in evidence. The reason is obvious. The paragraph remaining in his answer enables him to secure the full benefit of all his evi-

dence." *Over v. Shannon*, 75 Ind. 352, by Elliott, J., who also quotes approvingly from the opinion of Worden, J., in *Abdil v. Abdil*, 33 Ind. 460: "In an action to recover real estate, all matters of defense can be given in evidence under the general denial; and in such case, if good special answers are held bad, the error may be harmless, because the defendant can offer the matter pleaded, under the general denial, and avail himself of any question of law arising thereon by instructions, or otherwise."

According, however, to the reasoning advanced to maintain the harmfulness of the ruling of the trial court in this case, such a special pleading having been by the court decided to be insufficient, the defendant would have a right to rely upon the court's adhering to the ruling throughout the case and would not therefore be required to offer his evidence on the trial, although admissible under the issues joined.

A rule of law adverse to this contention and in harmony with our views is stated in *Landwerlen v. Wheeler*, 106 Ind. 523; *Epperson v. Hostetter*, 95 Ind. 583; *Rush v. Thompson*, 112 Ind. 158; *Porter v. Silvers*, 35 Ind. 295; *Emmons v. Meeker*, 55 Ind. 321; *Pittsburg, etc., R. R. Co. v. Van Houten*, 48 Ind. 90; *State ex rel. v. Osborn*, 143 Ind. 671; *Claypool v. Jaqua, Admr.*, 135 Ind. 499.

In the case last cited it is said by Judge Dailey: "Where a demurrer is sustained to a good paragraph of pleading, but the same facts can be proved under another paragraph not demurred to, or to which a demurrer is overruled, no damage can result to the party, and the ruling will be harmless."

In not a single case to which our attention has been called has the rule been stated otherwise than as here contended, for, save *Bunting v. Mick*, *supra*, and *Catlett v. Gilbert*, 23 Ind. 614, the latter having been expressly

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overruled by *Allis v. Nanson*, *supra*. In *City of Elkhart v. Wickwire*, 87 Ind. 77; *Lester v. Brier*, 88 Ind. 296, and *Hormann v. Hartmetz*, 128 Ind. 353, some language is used by Judge Elliott which has been claimed to be an intimation of a possibility of a different rule, but what is said upon this branch of the subject is really outside of the cases decided, and no such different rule has been adopted by the Supreme Court, while the law is thus broadly stated in Elliott's App. Proced., section 637: "Where a demurrer is sustained to one of several paragraphs of an answer the error is harmless if there are other paragraphs under which the same evidence is admissible." Neither do we think that Judge Elliott intended to or does say more than that the error will be harmful when the case made by the paragraph remaining is in substance and legal effect such as in law (not in the opinion of the trial judge merely) requires additional evidence to establish it.

To the same effect is Work's Practice, section 537: "Out of these same statutory provisions grows the doctrine that a ruling on demurrer, although erroneous, will not reverse the cause if the ruling does not affect the substantial rights of the complaining party. Thus, where a demurrer is sustained to a good paragraph of pleading, but the same facts can be proved under another paragraph not demurred to, or to which a demurrer has been overruled, no injury can result to the party and the ruling will be harmless."

The limitations of the doctrine that a party may rely upon the announced ruling of the court and need not attempt to again present or raise the question passed upon and its non-applicability to the case in hand are clearly shown by Elliott's App. Proced., sections 668-669, from which we quote:

"Where an adverse ruling upon a demurrer *so oper-*

ates as to wrongfully deprive a party of the right to introduce evidence establishing a cause of action or a defense, a proper exception duly entered is sufficient to fully present the ruling for review on appeal. No further decision or ruling need be requested in any form. As we have elsewhere shown, the presumption is that the court adheres to the theory declared, either expressly or impliedly, in its rulings upon the pleadings. * * * It is obvious that it would completely nullify the elementary rule that the evidence must be confined to the issues to hold that in order to make the error available a party must offer evidence in support of the cause of action or defense asserted in the complaint or answer held bad upon demurrer, since, without some pleading tendering the proper issue he could not give any such evidence. The court in ruling the pleading insufficient declares that it is useless and vain to offer such evidence, and in the face of such a declaration the party is not bound to offer evidence, for he cannot be required or expected to do a vain and fruitless thing. He has, in strictness, no right to do so, in view of the decision of the court which it is his duty to respect."

It will be observed that this is the principle and reasoning upon which the decision in *Bunting v. Mick*, *supra*, is based, but the limitation of the doctrine to rulings which "so operate as to deprive a party of the right to introduce evidence establishing a cause of action or defense" is overlooked because there, as here, the evidence was admissible under another paragraph, and it would not have been a "vain and useless thing" for the party to offer it; therefore, as said by the author in section 669, "It is true that it is adjudged that the paragraph is insufficient, but no harm can result from such a ruling, if, in fact, no competent evidence is excluded, and it is not excluded if other

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paragraphs are left standing which entitle it to admission."

In our own court in several cases the law has been declared in harmony with out present holding. "So, also, it is harmless error to sustain a demurrer to a good paragraph of answer, if there be another paragraph remaining under which the same facts may be proved. *McFadden v. Schroeder*, 9 Ind. App. 49, per Lotz, J.

"It is conceded that the facts pleaded in this paragraph were admissible under the general denial, which was also pleaded. The error, if any, was therefore harmless. *Elliott's App. Proced.*, section 637, and cases cited." *Kelley v. Kelley*, 8 Ind. App. 606, per Reinhard, J.

"The rule is that it is harmless error to sustain a demurrer to a good paragraph of answer, if there is a paragraph remaining under which the same facts may be proven." *Pottlitzer v. Wesson*, 8 Ind. App. 472, per Davis, J.

If we are not now right then the Supreme Court must have been wrong in the very recent case of *Berkey v. City of Elkhart*, 141 Ind. 408, per Hackney, J., where it held the action of the court in sustaining a demurrer to an answer harmless because the matters were admissible without plea. The court there says: "The ruling of the court, in sustaining appellee's demurrer to the second paragraph of answer, in view of the admissibility, without plea, of the defense pleaded, if a valid defense, was harmless." Yet every reason urged in favor of the harmfulness of the error here could be urged with equal plausibility there. It could be there as well said, the court had announced its theory of the case, had ruled that it was useless for the defendant to prove his answer, and he was there-

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fore not called upon to do so, but might presume that the court would continue to so hold, etc.

The rule here asserted on behalf of the appellant would lead to the anomalous result that we should hold that a defense is not available, although the defendant is entitled to prove it under the issues, to an instruction that the facts thus proved do constitute a defense, to a verdict when he has proved it, or to a judgment if the fact be specially found by court or jury.

' It was recently said by Judge Ross in *Berkey v. City of Elkhart*, 13 Ind. App. 314: "On the appeal of this case to the circuit court, the appellant was entitled under his answer of general denial to make the defense which he sought to set up in his special answer, hence it would not be error to sustain a demurrer to the special answer while appellant had the benefit of his answer of general denial."

Of course, where the answers are different in their scope and legal effect, proceeding upon different theories, one being, for instance, fraudulent representations and the other breach of warranty, the one defense would not be available under the other answer, even though the paragraph might in part cover the same ground.

Here, however, there is no difference between the answers as to the theories upon which they proceed. Each proceeds upon the same theory, counts upon the same defense, unless we are to affirm that every added averment of an additional fact constitutes a new and different theory.

So far as relates to the conduct of this particular cause, we may say that the court, in its instructions, did not refer to the question of burden of proof as to knowledge, and it is reasonably plain that that fact did not seriously figure in the case, since the de-

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fendants in answer to interrogatories expressly admitted that at the time of the purchase they did have knowledge that the note was given for a patent right. This fact emphasizes the wisdom of the doctrine that the party must present his evidence to the court upon trial.

Judgment affirmed.

ROSS and REINHARD, JJ., dissenting.

ON PETITION FOR REHEARING.

GAVIN, J.—Appellant's learned counsel argue upon the apparent supposition that the statute made it criminal for appellees to purchase the note in suit. In this he is in error. It is the seller and not the buyer of the note who is by the law declared a criminal.

The proposition that the note was absolutely void and therefore not a proper subject for estoppel is the basis of appellant's entire argument. This we adjudged and still adjudge to be not well founded. If the note was absolutely void it could not be enforced even by an innocent holder. *Vorcis v. Nussbaum*, 131 Ind. 267.

Repeated decisions in Indiana settle the law to be that such notes are enforceable in the hands of innocent holders. *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40; *Tescher v. Merea*, 118 Ind. 586; *State Nat. Bank v. Bennett*, 8 Ind. App. 679.

Therefore it logically follows that this note was not void, but voidable only. Consequently we held, not that appellees took the note as innocent purchasers, but that the note was such as might be the subject of estoppel and that an estoppel did arise when appellees purchased the note at appellant's request and upon his promise to pay the same.

Petition overruled.

DISSENTING OPINION.

ROSS, J.—The third paragraph of the answer proceeded upon the theory and set up as a defense to the appellees' right to recover upon the note sued on, that said note "was executed in consideration of the sale and transfer" of a patent right, "and that there was no clause or words inserted or written in said note stating that the same was given for a patent right."

The statute, section 8131, Burns' R. S. 1894 (6055, R. S. 1881), provides that any written obligation given in consideration for a patent right shall have inserted in the body of it the words, "Given for a patent right," and section 8132, Burns' R. S. 1894 (6056, R. S. 1881), makes it a misdemeanor for any person to take or sell or offer to sell any obligation given for a patent right which does not have inserted in the body of it the words designated in the preceding section and quoted above. While a promissory note negotiable by the law merchant, given for a patent right is forbidden by the statute, and, as between the parties and those having knowledge that the law has been violated, it will not be enforced, yet in the hands of an innocent purchaser before maturity it is enforceable.

The majority opinion concedes that the third paragraph of the answer states a good defense and that the court below erred in sustaining the demurrer thereto, but holds that the error was harmless because appellant had other paragraphs of answer in, and which were held good on demurrer, under which he could have introduced all of the evidence which would have been admissible under that paragraph. I cannot concur in the holding that the error in sustaining the demurrer to the third paragraph of the answer was harmless.

I admit that it is a harmless error to sustain a de-

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murrer to a good paragraph of an answer, if the party under another paragraph which remains in, can have the benefit of the same defense pleaded in the paragraph stricken down. The rule is well settled in this State. *Darnell v. Sallee*, 7 Ind. App. 581; *Kelley v. Kelley*, 8 Ind. App. 606; *McFadden v. Schroeder*, 9 Ind. App. 49; *Heaton v. Lynch*, 11 Ind. App. 408; *Messick v. Midland R. W. Co.*, 128 Ind. 81; *Butler v. Thornburg*, 131 Ind. 237; *Claypool v. Jaqua, Admr.*, 135 Ind. 499. An examination of the adjudications will disclose that in most of the cases where the court has stated the rule to be that where a demurrer is sustained to a good paragraph of answer, the error is harmless if another paragraph remains in, under which "the same facts can be proved," were cases where the defense specially pleaded and stricken down, was admissible under the general denial also pleaded. In those cases no harm could possibly have resulted to the defendant by the action of the court in sustaining a demurrer to the special answers.

I do not take exception to, but on the contrary fully concur in the statement contained in the majority opinion that the proposition is settled "that where a demurrer is sustained to an answer all the averments of which are included in another, under which the facts may be proved and the defense made available, then there is no reversible error in such ruling." What I do object to is, as I believe, its misapplication in this case. The majority opinion states the rule embracing the element of availability of the defense contained in the answer stricken down, under the answer left in, but when the rule is applied to the case in hand that element is overlooked.

The fourth paragraph of the answer filed by the appellant and which the majority opinion holds entitled the appellant to make the same defense alleged in the

third paragraph, is radically different from the third, and introduced into the defense pleaded a material issuable fact, namely as to whether or not the appellees, at the time of the purchase of the note, had notice or knew that it was given for a patent right. By the rulings of the court the appellant was told not only that the third paragraph of his answer was insufficient, because it did not aver that at the time the appellees purchased the note he had notice or knew that it was given for a patent right, but also that the fourth paragraph was good because it contained that additional averment. It may be admitted that all of the evidence admissible and necessary to sustain the third paragraph of the answer was admissible under the fourth paragraph; but proof which would sustain the third paragraph would fall far short of establishing the defense pleaded in the fourth paragraph. The defense pleaded in the third paragraph was one which would have been available against the original payee of the note, while that contained in the fourth was applicable only to a purchaser before maturity. The one was founded upon a violation of a statute of which the payee was bound to take notice, while the other, although alleging a violation of the statute, negatived the fact that appellees were innocent holders even though they purchased the note before maturity. The two defenses are radically different.

When two special answers are filed, both of which are good, and to one a demurrer is sustained, and to the other a demurrer is overruled, the question of the harmfulness of the ruling in sustaining the demurrer to the one is not to be determined simply by ascertaining whether or not the facts provable under the paragraph held bad, were also provable under the other, but rather by deciding whether or not proof of the facts alleged in the paragraph held bad estab-

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lishes the defense pleaded in the paragraph held good. For if establishing the facts provable under the paragraph held bad does not establish the defense alleged in the paragraph held good it cannot be said that under the latter paragraph the party has had the benefit of the defense pleaded in the former. It is not merely a question as to the admissibility of evidence, but rather the availability of a good and legal defense.

In the case of *City of Elkhart v. Wickwire*, 87 Ind. 77, where the question decided was whether or not the error of the court below in sustaining a demurrer to a good paragraph of complaint was harmful, when there was another paragraph in which was set forth the same cause of action, the court says: "In this case the first and second paragraphs of the complaint are substantially the same, and the evidence admissible under both was clearly admissible under the first alone, and there was, therefore, no error in sustaining the demurrer to the second paragraph, even if it be deemed good. If the first paragraph were not broad enough to let in all the evidence admissible under both, or if the case made by the first paragraph required more evidence to sustain it, thus imposing a heavier burden on the plaintiff, or if the different paragraphs required different evidence, then, perhaps, it would be otherwise. It is obvious, however, that where two paragraphs secure to the plaintiff no greater benefits than one would do, he is not injured by sustaining a demurrer to one of them, and this is true of the case in hand. Where, as here, the pleading on its face, as well as the whole record, clearly shows that the cause of action stated in two paragraphs of the complaint is the same, and can be made out by the same evidence, there is no error in sustaining a demurrer to one of the paragraphs." And the same court in *Hormann v. Hartmetz*, 128 Ind. 353, says:

"Where, however, a paragraph of a complaint is erroneously adjudged insufficient, and others are held good, the error is not harmless if the paragraphs allowed to stand are substantially different from that held bad, or if those held good impose upon the plaintiff the burden of adducing stronger or greater evidence than would be necessary under the paragraph condemned. If, in other words, the effect of the ruling on demurrer is to make it necessary to introduce more or greater evidence, or to exclude competent evidence, the error may be prejudicial, but it is otherwise where the ruling on demurrer does not have the effect either to abridge the right of the plaintiff or to increase his burden."

And again in *Lester v. Brier*, 88 Ind. 296, it is said: "Where the paragraphs left standing entitle the plaintiff to the same relief as, and require of him no other or greater evidence than, the one held bad would have done if declared good, then he is not harmed. If, in other words, the paragraphs left in are provable by the same evidence as the one struck out, then no injury results from the ruling. *City of Elkhart v. Wickwire*, 87 Ind. 77. Where, however, more or different evidence is required, or the plaintiff's case is made more difficult of proof, or his burden increased, then it would be error to strike out a paragraph or sustain a demurrer to it if it stated a cause of action."

It would not have availed appellant to have proven under the fourth and eighth paragraphs of his answer simply the facts alleged in the third paragraph, for the court had already decided that those facts were insufficient to constitute a defense to the action.

And I do not believe as seems to be the intimation in the prevailing opinion, that the appellant was bound to make proof of the facts necessary to establish the defense pleaded in the third paragraph of his

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answer (the one held bad), and then ask the court to instruct the jury that those facts were all that were necessary to entitle him to recover under the fourth paragraph. In other words, I am not willing to say it was appellant's duty, on the trial, to insist that he was not required to prove notice, although he raised that issue by his answer, and further that when the court came to instruct the jury, the appellant should insist that the court tell them that while the court, in making up the issues had told the appellant he must prove notice on appellees' part, yet that was not the law and appellant need not prove that fact although he alleged it in his answer. I believe most *nisi prius* courts would feel highly insulted at the assumption, and the counsel who would dare to make such a suggestion would fare badly at the hands of the court.

In *Wilson v. Town of Monticello*, 85 Ind. 10, the court says: "Where a plea is struck down, the presumption is that the rule of law involved in the ruling was acted upon throughout the case, and the defendant is not bound to again present the question. An objection once well and fully presented, and properly and adequately reserved, does not need to be repeated at subsequent stages of the case. A defendant who receives the judgment of the court upon his answers may accept that ruling as the declaration of the court that it would be useless to offer evidence under it, for if fully proved the defense set forth would not be allowed to prevail."

The issues made by the pleadings control the action of the court in the trial and decision of the case, and a defendant has a right to know what facts, when pleaded, are sufficient to constitute a defense.

The appellant had a right to assume, when the court below sustained the demurrer to the third paragraph of his answer, that if he proved those facts on

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the trial the court would hold that he could not recover. And he had also a right to assume, when the court overruled the demurrer to the fourth paragraph, which was exactly the same as the third, except that it contained the additional allegation, that the plaintiffs(appellees) at the time they purchased the note had notice or knew that it was given for a patent right, that the burden was on him to prove such notice or knowledge. This is the theory upon which the parties tried the case and the appellant, having been informed by the court that he must prove that the appellees, at the time they purchased the note, knew it was given for a patent right, tendered an instruction to that effect and requested the court to so instruct the jury and the court did so instruct them. The record shows affirmatively that the only instruction given by the court to the jury, told them in effect that under the issues the burden rested upon the appellant to prove that the appellees knew or had notice, at the time they purchased the note, that it was given for a patent right. That was the theory upon which the court below tried the case, and it seems to me that to hold that no harm was done when both the court and the parties, made up the issues and tried the cause upon the theory that the appellant had the burden of proving notice or knowledge on appellees' part, would be a travesty upon justice.

I think the case of *Bunting v. Mick*, 5 Ind. App. 289, is in every respect identical with the case in hand, and is decisive of the questions here involved. In that case, which was an action by an endorsee, against the makers upon a note negotiable by the law merchant, endorsed before maturity and which was given for a patent right, the court in passing upon the harmfulness of rulings on demurrers to answers filed, says: "The 1st and 2d paragraphs, to which the demurrer

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was addressed and sustained, contained no averments of notice of the defenses which the maker had to the note, on the part of the endorsees, George and Mick, at the time of the respective endorsements to them. By sustaining the demurrer and requiring the appellant to set up in subsequent paragraphs, in addition to the averments of want of consideration and fraud, the fact that both appellee and George at the time of the endorsements to them had notice of such defenses, the court in effect decided that an answer of the character of these, without the averment of such notice was insufficient, and that such averment was required to make it sufficient. If the paragraphs to which the demurrer was sustained were good, however, without such averment of notice, then the fact that they were subsequently pleaded again, supplemented by the averment of notice, cannot be said to make the error harmless. The additional paragraph cannot be regarded as an amendment to the paragraphs to which the demurrer was sustained and as taking the place of these. If the answers to which the demurrer was sustained were good without charging notice to the endorsees, the court should have overruled the demurrer. The appellant had a right to this ruling so as to be informed whether or not he was to take the burden upon the subject of notice, or whether it should devolve upon the appellee to aver and prove a want of notice."

For these reasons I think the judgment of the court below should be reversed with instructions to sustain appellant's motion for a new trial.

REINHARD, J., concurs in the dissenting opinion of ROSS, J.

Cray, Administrator, v. Wright.

CRAY, ADMINISTRATOR, v. WRIGHT.

[No. 1,815. Filed October 16, 1896.]

DECEDENT'S ESTATES.—Settlement as Insolvent.—Fraudulent Conveyance of Real Estate by Intestate.—The court upon sustaining objections to the settlement of an estate as insolvent, on the ground that the intestate had made fraudulent conveyances to his children, may render a decree denying the petition of administrator to settle as insolvent, and ordering him to proceed under section 2488, Burns' R. S. 1894 (2333, R. S. 1881), to avoid the fraudulent conveyance.

From the Grant Circuit Court. *Affirmed.*

R. T. St. John and *W. H. Charles*, for appellant.

A. E. Steele, for appellee.

REINHARD, J.—Appellant as administrator of the estate of one Reuben Garrison, deceased, filed his petition in the court below to settle said estate as insolvent. The appellee appeared and objected to such settlement, alleging that said decedent in his life time was the owner of certain described real estate and that he conveyed the same in August, 1892, to his children and heirs, without any consideration and with the fraudulent intent of cheating and defrauding the appellee and other creditors out of their debts and just claims.

The court tried the cause and found the facts alleged in the statement of objections to be true; that the deeds from the decedent to his children and heirs, as described in the appellee's petition, were fraudulent and void as to creditors and ought to be set aside and the petition to settle as insolvent denied. The court rendered a decree according to the finding and ordered that the lands mentioned be sold and sub-

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jected to the payment of decedent's debts, and denied the prayer of the petition to settle as insolvent.

The grantees of the deeds set aside were not parties to this proceeding, and how they can be bound by the decree is difficult to understand. But as they are not now before the court it may be that the administrator is not in a position to raise this question. The judgment of the court may be valid to the extent that it denies the petition of the administrator to settle the estate as insolvent, and the remainder of the decree may be binding upon the administrator as an order to proceed against grantees and heirs to set aside the conveyances to the former by said decedent and grantor as fraudulent or voluntary conveyances.

The statute subjects to the payment of the decedent's debts "all lands, and interest therein, which the deceased, in his life time, may have transferred to defraud his creditors." Section 2486, Burns' R. S. 1894 (2333, R. S. 1881), subd. 3.

When the administrator is authorized to sell such lands by the court, he must before proceeding to sell bring the parties into court by the proper action. Section 2488, Burns' R. S. 1894 (2335, R. S. 1881).

In such action the parties will be given their day in court and may show that the conveyance was in good faith, or they may interpose any lawful defense.

Perhaps the appellee as a creditor of the decedent could have maintained an action to have the conveyances set aside as fraudulent. *Bottorff v. Covert*, 90 Ind. 508. But such action could not be binding upon the grantees unless they were parties thereto.

We have examined the evidence and think it was sufficient to authorize the court to deny the petition to settle as insolvent and to order the administrator to proceed under section 2488 (2335), *supra*.

Judgment affirmed.

State, *ex rel.* Holland v. White, Special Judge.

STATE, EX REL. HOLLAND v. WHITE, SPECIAL JUDGE.

[No. 2,182. Filed July 21, 1896. Rehearing denied Oct. 16, 1896.]

BILL OF EXCEPTIONS.—*Signature of Judge.*—*Mandamus.*—Ninety days' time was given for appellant to file bill of exceptions. Two days before the expiration of said time appellant's counsel called to secure the signature of appellee, who as special judge had tried the cause, but appellee was absent from home at the time and did not return for several days thereafter. Counsel for appellant thereupon caused the clerk to indorse on the bill of exceptions that the same had that day been presented for the signature of the judge, and the counsel took it but failed to present it for the judge's signature until nine months had elapsed, during all of which time the judge (appellee) was almost continuously at home. The judge refused to sign the bill. *Held*, in an action by appellant to mandate the judge that the judge properly refused to sign the bill of exceptions.

Original Action. *Writ of Mandate Denied.*

W. G. Houk, for appellant.

A. F. White, for appellee.

REINHARD, J.—This is an original proceeding by the relator to obtain from this court a writ of mandate against the defendant, Ared F. White, as special judge of the Montgomery Circuit Court, commanding him as such special judge to sign a bill of exceptions in a cause tried by and before him in said court, and appealed to this court. The facts as gathered from the pleadings appear to be that Judge White, who is the judge of the 47th judicial circuit and resides at Rockville, Parke county, was called as special judge of the Montgomery Circuit Court to try the case of John D. Holland v. William M. Davis and William L. Smith. The cause was tried on the 13th day of June, 1895, the

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finding and judgment being for the defendants. There was a motion for a new trial which was overruled on the 19th day of June, 1895, and ninety days' time was given the plaintiff in which to prepare and file his bill of exceptions. The time for presenting the bill of exceptions expired on the 19th day of September, 1895. On the 17th day of September, 1895, the attorney for the plaintiff in said cause went to Rockville, the home of Judge White, to present to him the bill of exceptions, when he learned that said judge had left the town and State, and would not return for several days, and until after the expiration of the time for filing said bill. Said attorney thereupon caused the clerk of the Parke Circuit Court to enter notice on the back of the bill of exceptions prepared by him that the same was on that day presented for the signature of said judge.

The record containing the draft of said bill of exceptions was then immediately withdrawn from the custody of the clerk of the Parke Circuit Court and taken away by said attorney. On Sunday, the 14th day of June, 1896, the said attorney for the first time presented said bill of exceptions to Judge White and requested him to sign the same as if it had been presented to him on the 17th day of September, 1895. The judge retained the paper until the 16th day of June, 1896, when he returned it to said attorney with the statement that he would not sign it as requested. The sworn statement of the attorney accompanying this application says that the defendant, Holland, was then a poor man and in bad health and unable to work most of the time since the trial, his labor being his only means of obtaining money to procure said bill of exceptions; that the said record was very voluminous, being made so by the improper admission in evidence by said judge in the trial of said cause of divers

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lengthy documents, thus rendering the expense of said records very heavy, for which reasons he was unable to have said bill of exceptions ready to present to said judge until the 17th day of September, 1895. No reason is given for the failure of said attorney to visit Judge White and to present said bill to him when the latter returned to his home or within a reasonable time after the occurrence in the clerk's office at Rockville, or for the failure to leave the same at Rockville. Judge White states in his answer to the application that he knew nothing of any attempt or effort to present any bill of exceptions to him until the 14th day of June, 1896, the time when said attorney came to him and requested him to sign said bill, and to date the presentation back to September 17, 1895; that he then asked said attorney the cause of the delay in the presentation thereof for a period of nearly nine months after the time for filing it had expired, and that said attorney gave as a reason that the stenographer required him to bring the bill back with him from Rockville on the said 17th day of September, 1895, because she wanted it to remain in her possession until her fees were paid in full; that at no time did plaintiff or his counsel ever notify him that the bill would be or was being prepared, or that on any particular day plaintiff or his counsel would require the judge's presence at his home or elsewhere to settle and sign such bill; that the judge was almost continuously at his home in Rockville, which is about 28 miles from Crawfordsville, where said trial was had, until the 16th day of September, 1895, when he left the State for a few days and returned on the 21st day of said month, having been absent about five or six days; that he has remained continuously in this State since then, and has been at Rockville almost all of said time, having during said time held three terms of

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the Parke Circuit Court, but that said bill was not presented to him until June 14, 1896, as aforesaid.

Under these circumstances it is hardly necessary to state that the relator has shown no diligence whatever to comply with the order of the court in the presentation of the bill of exceptions. Assuming without deciding that the plaintiff's financial inability to procure the record sooner constituted a valid excuse for delaying the presentation of the draft of the bill to the judge up to within two days of the expiration of the time given for presenting the same, the attorney was at fault in not leaving the document either at the residence of the judge, or with the clerk of the Parke Circuit Court with the request that it be presented to Judge White upon his return to Rockville. Instead of pursuing some such course as this he took the paper away with him and retained it for nearly nine months without ever making a single effort to have the same signed during that period. It appears to us that this delay is inexcusable. Had the judge signed the bill at the time he was finally requested to do so and dated the presentation thereof back to the 17th day of September, 1895, and that fact were made to appear, we should be compelled, on motion of the appellee, to strike the bill of exceptions from the files or proceed as if no such bill had ever been filed. To compel the judge now by the mandate of this court to sign the bill would be both unprecedented and unwarranted. If it be true that the cost of the record was unnecessarily increased by the illegal admission of documentary evidence so that the relator, who is poor, and was in ill-health, was unable to procure the same from the stenographer at an earlier date, it is a misfortune for which the law does not furnish such a remedy as he invokes here. As already observed, if the relator or his attorney had left the draft of the

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bill of exceptions at Judge White's home or office or with the clerk of the Parke Circuit Court before the time given for presenting the same had expired, with directions to deliver to the judge, the case might be different. We think Judge White very properly refused to sign the bill when it was presented to him.

The prayer of the petition for the writ is therefore denied, at the cost of the relator, John D. Holland.

DEDERICK ET AL. v. BRANDT.

[No. 1,765. Filed October 20, 1896.]

SHERIFF.—Power of.—Replevin.—The power of a sheriff, or his deputy, to seize property by virtue of a writ of replevin issued from the circuit court of his county is confined to property in his own county.

REPLEVIN.—As Against a Trespasser.—Possession of personal property is sufficient to authorize the possessor to maintain replevin against a mere trespasser.

EVIDENCE.—Pleading and Proof.—Variance.—Evidence of title in a corporation is not sufficient to sustain a claim of ownership by one who is a member of the corporation.

APPEAL AND ERROR.—Objection to Form of Judgment Must be Made in Trial Court.—When no exception was taken to the form of judgment in the court below, and no motion made to modify, the question can not be raised on appeal.

From the Jasper Circuit Court. *Affirmed.*

Thomas J. Wood, for appellants.

Ralph W. Marshall, for appellee.

GAVIN, J.—Appellee sued appellant Sollars, seeking to recover possession of a haypress. Sollars justified his possession as holding for and under the sheriff of Lake county, who had taken the press from appellee by virtue of a writ of replevin. Dederick was made a party defendant upon his own motion and answered

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also that he owned the property and was entitled to hold it. The questions presented are raised by the motion for new trial.

While the evidence is conflicting, there is abundant to justify the court in holding that the press was taken from appellee's farm in his absence and against his direction, by the deputy sheriff under and by virtue of the writ of replevin he then held. This writ was issued from the Lake Circuit Court, directed to the sheriff of that county, in a case wherein appellant Peter K. Dederick, was plaintiff, and Parmlee & Brown were defendants, the appellee not being a party thereto. The property was seized by the deputy Sheriff of Lake county in Newton county. Appellee had been in possession of the goods as purchaser thereof for two years. This taking was clearly unlawful. The sheriff's powers were limited to his own county.

The appellee's possession was sufficient to authorize him to protect that possession against a mere trespasser. Cobbey Repl., section 93; *Hunt v. Chambers*, 21 N. J. L. 622; Wells Repl., section 109; *Moorman v. Quick*, 20 Ind. 67.

There was also ample evidence to justify a finding that the appellant, Peter K. Dederick, was not the owner of the press. Evidence of title in the Peter K. Dederick Manufacturing Company would not sustain a claim of ownership by him. The members and the corporation have separate legal personalities. *Cutshaw v. Fargo*, 8 Ind. App. 691. No exception was taken to the form of the judgment nor was there any motion to modify the same. Consequently there can be no question raised here concerning it. *Cockrum v. West*, 122 Ind. 372; Elliott's App. Proceed., sections 345, 350.

Judgment affirmed.

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LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. PORTER.

[No. 1,844. Filed October 20, 1896.]

RAILROAD COMPANY.—*Damages by Fire.—Contributory Negligence.*
—*Special Finding.*—A judgment against a railroad company for damages for negligently causing a fire is not sustained by a special finding which fails to find facts showing that the damages resulted without contributory negligence on the part of plaintiff.

From the White Circuit Court. *Reversed.*

E. C. Field, W. S. Kinnan, E. B. Sellers and W. E. Uhl, for appellant.

Simon P. Thompson, for appellee.

DAVIS, C. J.—This suit is prosecuted by appellee against appellant to recover damages sustained by fire. The complaint is in six paragraphs. The first three paragraphs charge appellant with negligently causing a fire on July 28, 1893, which burned the meadow, sod, turf, and grass roots, destroying the same off of six acres of appellee's land, and burned up and destroyed twenty rods of fence.

The fourth, fifth, and sixth paragraphs of the complaint allege a second fire, of September 4, 1893, which "burned the said sod, turf, and grass roots and totally destroyed the same off of two acres and one-half of ground from one to three feet deep, to plaintiff's damage \$80.00; and burned and destroyed twenty rods of said wire fence, to plaintiff's damage \$10.00; burned injured and damaged forty rods of tile, to plaintiff's damage \$80.00, in all to plaintiff's damage \$170.00.

Appellant's line of railroad crosses appellee's land, cutting off five acres of the northeast corner. The

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first fire burned over appellee's land or a part thereof, lying southwest of the track. The fire of September 4, burned over two and one-half acres of the five-acre piece lying northeast of the track.

The jury in their special verdict assess appellee's damages resulting from the first fire, which burned over six acres southwest of the track, at \$14.50.

The damages resulting from the fire of September 4, are assessed by the jury at \$130.00.

Appellant's motion for judgment in its favor on the special verdict was overruled and exceptions duly saved, and judgment rendered in favor of appellee for \$144.50, to which appellant excepted.

Appellant's motion for a new trial was overruled and exceptions duly saved.

The assignment of errors brings all these questions to this court for review.

Counsel for appellant insist that the special verdict is insufficient because it fails to find any facts from which the court can adjudge as a conclusion of law that the damages resulting from the fire of September 4, were caused without appellee's contributory negligence. One contention is that the finding that it was "without any fault or want of care on the part of the plaintiff," is a conclusion and not the finding of a fact, and must, therefore, be disregarded.

As to the September fire the jury find that a large coal of fire escaped through the defective netting and broken meshes of appellant's spark arrester on a freight train and was blown into the air from the appellant's smoke stack and was carried by the breeze to appellee's land, and that it set on fire the dry grass on appellee's land "and immediately spread over plaintiff's land to the northeast of said right of way and set fire to the muck, peat and decayed vegetation in said drained pond and continued to burn therein

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for a space of thirty days, burning and destroying the soil thereof to the depths of from one to three feet, from two and one-half acres of plaintiff's said land located next to said schoolhouse and the said public highway, destroying the usefulness of said tile, and destroying twenty rods of the plaintiff's said fence, in all to the damage of plaintiff's said land \$130.00. After said fire was kindled the plaintiff's tenant took active means to prevent said fire from burning a greater quantity of plaintiff's said land by digging ditches."

It is not necessary to set out the finding in full or substance thereof, but it will suffice to say that the facts found show that the fire was the result of appellant's negligence and that the appellee was free from fault in suffering the fire to escape to his premises.

No fact or circumstance, however, is found in addition to what is embraced in the findings above set out, indicating when appellee or his tenant first discovered the fire or what, if any, effort was made by either of them to prevent the destruction of the two and one-half acres of the fencing or tiling mentioned in the finding.

It is true the finding shows that after the fire was kindled appellee's tenant took active means to prevent said fire from burning a greater quantity of appellee's land by digging ditches. How long after the fire was kindled this was done, does not appear. The inference is, however, that the active means referred to were not made to prevent the burning of the two and one-half acres of fencing or tiling for which damages were allowed by the jury. The inference is that the active means referred to were employed to prevent said fire from burning other lands. In other words no fact is found indicating that within said

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thirty days any effort was made to prevent the burning of the two and one-half acres or the tiling or the fencing above mentioned. The only fact found in relation to the knowledge or conduct of appellee or his tenant relates to what was done to prevent the burning of a greater quantity of land. As before stated, when the effort was made is not found. For aught that appears it may have been at the expiration of the thirty days from the time the fire was communicated to the two and one-half acres. The finding is that the destruction of the fire continued for thirty days. How much of the damage had been done to the two and one-half acres and the fencing and tiling before the fire was discovered by appellee or his tenant is not shown. Neither does it appear that anything was or was not done, or that anything could or could not have been done to check the spread of the fire or to prevent the destruction of the two and one-half acres or the fencing or tiling after the discovery of the fire within the thirty days. In other words nothing whatever appears in the finding as to the knowledge or conduct of appellee or his tenant during the thirty days that the two and one-half acres and the fencing and tiling in question were being burned. No fact is found tending to show that appellee was free from fault contributing to the injury, except as before stated the facts found are sufficient to show that the origin of the fire on his premises was without fault on the part of appellee. As the finding of facts shows that the fire continued the burning of the two and one-half acres for thirty days, the facts as to the knowledge or conduct of appellee in relation to the fire during that time should have been found. If the facts were found showing that appellee, during said thirty days, had no knowledge of the fact that the fire was burning his land, or that he made an effort to check

the fire, or that such effort would have been unavailing as to the two and one-half acres and fencing and tiling, the verdict would perhaps be sufficient. *Wabash, etc., R. W. Co. v. Johnson*, 96 Ind. 40; *Cleveland, etc., R. W. Co. v. Hadley*, 12 Ind. App. 516.

The facts found should show that appellee was free from fault contributing to the injury. At least the facts and circumstances connected with the destruction of his property should be so fully stated and found in the verdict as to justify the inference by the jury that he was free from fault contributing to the injury.

There is evidence in the record tending to prove that appellee was at Indianapolis when the fire originated on his land, and that when it was discovered by him nothing could have been done by him to prevent the injury or any part thereof caused by the September fire, on account of which he recovered damages in this action.

There is also evidence in the record tending to prove that the tenant of appellee as soon as he discovered the fire did all that could be done to prevent the destruction of the two and one-half acres. In other words if the facts testified to by the appellee and his tenant had been found by the jury in their verdict, they would, in our opinion, have justified the inference that the property burned by the September fire was destroyed without fault on the part of appellee.

Other questions are discussed, but as they may not arise on another trial, it is not necessary to decide them. Justice will be best subserved by granting a new trial.

The judgment of the trial court is reversed with instructions to sustain appellant's motion for a new trial.

Voss v. Wagner Palace Car Company et al.

VOSS v. WAGNER PALACE CAR COMPANY ET AL.

[No. 1,823. Filed Feb. 20, 1896. Rehearing denied, Oct. 20, 1896.]

SLEEPING-CAR COMPANY.—*Not Liable as an Insurer of Baggage.*—Sleeping-car companies are not liable as insurers of wearing apparel and effects belonging to passengers upon their cars, as inn-keepers would be liable, or as common carriers are held liable for baggage intrusted to them, while the passengers are occupying the berths assigned them, and are themselves in charge of their baggage. *p. 277.*

SAME.—*When Responsible for Baggage as a Common Carrier.*—Where a passenger of a sleeping-car delivers his baggage to the porter of the car to be by him carried from the car to the reception room of the depot, and such porter undertakes to do so and takes the same into his possession, the sleeping-car company becomes responsible as a common carrier for the safe delivery of such baggage. *ROSS, J., dissenting. p. 280.*

SAME.—*Negligence.—Notice Posted in Car.*—A sleeping-car company can not relieve itself from liability for the loss, by its negligence, of the effects of a passenger, by posting up in the car a notice by which it attempts to relieve itself of such liability; especially where such notice is not brought to the knowledge of the passenger. *p. 282.*

SAME.—*Porter in Charge of Baggage While Acting Within Scope of his Employment, Not a Gratuitous Bailee.*—A porter of a sleeping-car who, acting under the rules and customs of the company and within the scope of his employment, undertakes to deliver the baggage of a passenger from the car to the depot is not a mere gratuitous bailee. *pp. 287, 288.*

SAME.—*Loss of Baggage.—Negligence or Dishonesty of Employees.*—A sleeping-car company is liable for the value of a passenger's case which a porter in accordance with the rules of the company undertook to remove at the passenger's destination, and which by reason of the negligence or dishonesty on his part or that of another employe was lost or stolen. *pp. 282, 283.*

From the Marion Superior Court. *Reversed.*

George Shirts, I. A. Kilbourne, W. A. Pickens and L. A. Cox, for appellant.

B. K. Elliott, W. F. Elliott, J. E. Scott, A. Rabb, F. R. Babcock and Winston & Meagher, for appellees.

REINHARD, J.—The appellant sued the C., C., C. & St. L. R. W. Co. and the Wagner Palace Car Company

for the alleged loss of a seal cape, of the alleged value of \$250.00, while the appellant was a passenger upon one of the cars of said Wagner Company, on the railroad and train of the other appellee. The amended complaint alleges in substance that on the 24th day of September, 1892, the said railway company was operating a line of railway extending from the city of New York westward through the cities of Buffalo, New York, Cleveland, Ohio, and Indianapolis, Indiana, to the city of St. Louis, Missouri; and was the owner of said line from Cleveland to Indianapolis; that said palace car company on said day owned and operated over said line of railway between New York and St. Louis, a line of sleeping-cars which were drawn by the trains of said railway company under a contract or arrangement, the contents and terms of which are unknown to the plaintiff; that on said day the plaintiff was a passenger for hire on one of said railway company's trains, running from New York City to Indianapolis, Indiana, under a contract by which she was to be carried from said New York to said Indianapolis, together with her necessary and reasonable baggage, consisting of a seal cape of the value of \$250.00, and other baggage, which was to be carried from said New York to said Indianapolis, and at said last named place to be safely and securely delivered to plaintiff; that at the same time the plaintiff was a passenger for hire in a car owned and operated as aforesaid by said palace car company, and drawn as aforesaid by said railway company under a contract by which plaintiff, together with her reasonable and necessary baggage aforesaid, was entitled to be carried from New York to Indianapolis, upon the car of the said palace car company; that said last mentioned contract also provided that said palace car company should use due and proper care to protect

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said baggage from loss, and further provided that said palace car company should safely and securely carry and deliver said baggage to plaintiff at Indianapolis, Indiana; that on said day said plaintiff was traveling alone, and was sick and unable to take charge of her said baggage and remove the same from said car upon arriving at Indianapolis; that when approaching the railroad station at Indianapolis, on said day, and just prior to the time when the train arrived at said station, the officers and agents of the defendants in charge of said train and car, whose duty it was to attend to the removing of said baggage from said car at Indianapolis, took charge of all of said baggage from said car to the railroad station at Indianapolis; and the plaintiff being sick, and unable to attend to the removing of her baggage, gave unto the said agents of the defendants sole and exclusive possession of said baggage that it might be removed by them from the car to the station as aforesaid; that afterwards on said day said train and car drew into the railroad station of the defendants at Indianapolis, which station was enclosed and covered, so that the car in which plaintiff was, was quite dark, and was left unlighted, and was so dark that objects in the car could not be seen; that thereupon the plaintiff alighted from said car and entered that part of the railroad station provided for the reception of passengers on defendants' trains and cars; that said officers and agents removed all of plaintiff's baggage from said car and brought it to her in the reception room of said station at Indianapolis, except the said seal cape; but in disregard of their duty the said defendants, and each of them and their agents, carelessly and negligently failed to use due care in the delivery of said cape to the plaintiff in said reception room of said sta-

tion, and wholly failed to deliver to the plaintiff the said cape; that defendants, and each of them, failed to use due care to protect the said cape from loss, but that they and their agents and officers aforesaid negligently permitted the same to remain in said car when it arrived at Indianapolis, by reason whereof the same was lost or stolen, or was lost or stolen by the officers and agents of the defendants; that said loss occurred without any negligence on the part of the plaintiff, who used all possible means to recover said cape, and in this regard has been at an expense of \$——. Wherefore, etc.

To this complaint a demurrer was overruled, but as no question is made upon this ruling we need not determine the sufficiency of the complaint to withstand the demurrer. The palace car company answered the general denial, as did also the other appellee. The cause was submitted for trial to the court, and at the request of appellee, the court made a special finding of facts in the cause and conclusions of law thereon. One of the errors assigned is that the court erred in its conclusions of law on the special finding of facts.

The essential parts of the special finding are as follows:

That appellant had with her in the car two hand valises, one dressing case, one umbrella, and a seal-skin cape, all of which were placed in the section occupied by plaintiff.

Prior to entering the Union Station at Indianapolis, the porter, with the knowledge of the plaintiff, placed the seal-skin cape on the back of the seat she occupied, and arranged the balance of her baggage in two bundles, preparatory to carrying the same out of the car.

The appellant, though not seriously ill, was suffering from a temporary headache and fatigue owing to

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her long journey, but was fully conscious of everything going on; and upon the train, by the use of proper effort and care, all objects in the car were visible to her.

After said baggage was so collected and arranged and the cape placed upon the back of the seat occupied by appellant, she paid no further attention whatever to her baggage or to said article of wearing apparel, but left them all to the care of the porter, who agreed to remove all of her baggage to the depot on the arrival of the train.

The agreement and attempt of the porter to remove said luggage of the plaintiff, including said sealskin cape, was in accordance with the rules of the company in such cases.

All the rules upon this subject are set out in the findings, though it is also found that appellant had no knowledge of such rules.

Upon the arrival of the car at the Union Station, one door was locked and the other continuously guarded by the conductor during the absence of the porter in assisting the appellant, and upon the return of the porter he immediately entered the car and looked into the section which had been occupied by appellant, but did not find the cape, nor was the same thereafter found by either the porter or the conductor.

During the entire trip of appellant her sealskin cape and other luggage with her upon the car were in her own possession.

During all of said journey the plaintiff was traveling alone, and upon the arrival of the train at the station at Indianapolis the porter of said car attempted to remove from the car to the station all of the said luggage of the plaintiff, including said sealskin cape or coat, which was so undertaken with the knowledge, consent, and express permission of the conductor of

said car, and in accordance with the usual rules and custom of said Wagner Palace Car Company in such case.

The plaintiff was the only passenger in said car for said point, Indianapolis, and in accordance with said attempt and while in the discharge of his duty as such porter, the latter assumed to remove the said luggage of the plaintiff from the car to the station, and having in his possession all of said luggage, except said cape, alighted from the car, the plaintiff immediately behind him; and the plaintiff preceded by the porter proceeded from the car through the gates of the train shed and into the waiting room of said station, and to a point near the north door of said waiting room of said station; in doing which the porter and the plaintiff were at all times within the railroad station, and the plaintiff all this time supposing that the porter had in his possession said cape with the balance of the luggage.

The porter deposited the luggage at said point near the north door of said waiting room, and then and there turned over and delivered so much thereof as he had carried from the train to the plaintiff, and immediately the porter returned to the said car. Said train was destined for St. Louis, and on said day remained at said station fifteen minutes.

Said porter left in the section so occupied by the plaintiff in said Wagner palace car, the said sealskin cape or coat, and did not carry the same therefrom with said other luggage, and did not at any time deliver the same to the plaintiff, but, on the contrary, failed and omitted to remove the same from the car, and failed to deliver the same to the plaintiff.

Upon the facts found by the court, and in the light of the averments of the amended complaint, are the appellees, or is either of them, liable to the appellant

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for the loss of her garment? Appellant's counsel do not seem to insist with any degree of confidence that there is any liability on the part of the C., C., C & St. L. R. W. Co. It is difficult to see how that company could be held liable in view of the admitted fact that it never had the appellant's baggage in its possession. As to the railway company, therefore, we need not consume any further time or space. What appellant's counsel do contend, however, is that the Wagner Palace Car Company is liable upon the facts pleaded and found, and that the court's conclusions were, therefore, erroneous.

As a general rule, sleeping-car companies are not liable as insurers of the wearing apparel and effects belonging to passengers upon their cars, as innkeepers would be liable, or as common carriers of passengers are usually held liable for baggage intrusted to them, and who incidentally undertake to forward the same to the place of destination of the passenger and there deliver to him. In the case of a common carrier, the passenger usually consigns to its entire and exclusive care and custody the baggage he desires to have forwarded, by himself ceasing to exercise any oversight or supervision over the same whatever, while it is in transit, or at least while it is in the carrier's control, and the carrier becomes an insurer for the safe delivery of the property, as in cases of shipment of freight by carriers of goods. All that the passenger has to do in that kind of a case, in order to create a liability by the carrier, is to show the delivery of the goods to the carrier, and that they were accepted by the latter under an agreement, express or implied, to carry and to deliver them, and the failure to do so. *Toledo, etc., R. R. Co. v. Tapp*, 6 Ind. App. 304.

Sleeping-car companies do not usually receive into their sole custody the effects or luggage of the pas-

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senger to be forwarded to him, but the passenger retains the same in his own possession and control while occupying the berth or section of the sleeper assigned to him.

In the case of *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474, our Supreme Court very clearly defined the duties and liabilities of sleeping-car companies toward occupants of berths upon their coaches. It was there held that such companies are not liable, either as innkeepers or common carriers, for the loss of goods or money, but that they are responsible for such losses when the same occurred through the negligence of the company or its servants. Further than this the case referred to does not go. It only defines the duties and liabilities of sleeping-car companies while the passenger is occupying the berth or section assigned to him. What relation they sustain to him respecting his baggage while the same is being taken to and from the car by the company's servants is not determined.

Negligence being but a failure to discharge a duty which one person owes to another, the question of whether there was or was not negligence on the part of the sleeping-car company would seem to depend upon the further question whether the company had failed to discharge some duty owing to the passenger or occupant of the berth from it.

It would seem that where, as in this case, the porter of the car takes charge of and undertakes to remove all of the passenger's effects from the car to the waiting room of the station, or even to the foot of the steps outside of the car, the failure to remove all of such property and consequent loss of any part thereof, would constitute negligence in the sleeping-car company. The *Diehl* case, above cited, declares that the case of an occupant of a berth upon a sleeping-car is

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very much like that of an occupant of a stateroom on a steamboat; that the passenger in either of such cases is invited to disrobe himself and retire for the night to sleep; that he has a right to throw aside such care and precaution as men usually exercise when awake, and to intrust his person and such articles as he usually carries to the care and vigilance which the carrier in whose charge he has placed himself, undertakes to exercise in his behalf.

The rule laid down by our Supreme Court seems to be supported by the weight of authority, although at least one case has been brought to our attention which holds the sleeping-car company liable in such a case as an innkeeper. *Pullman Palace Car Co. v. Lowe*. 28 Neb. 239, 44 N. W. 226.

In *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814, 34 Am. and Eng. R. R. Cases, 217, it was held that a sleeping-car company, while not liable, as a common carrier of passengers for baggage, in its coach when the traveler himself has possession of it, or as an innkeeper as to guests, it is responsible as a common carrier of passengers would be in relation to the baggage of a passenger not given into its exclusive custody; and if, through failure of the carrier to exercise reasonable care, the baggage is stolen, the company is liable therefor, although the train to which the car is attached belongs to another company.

In a Massachusetts case practically the same rule was laid down, that although a sleeping-car company is not liable as an innkeeper for baggage stolen, still if the loss occurs through the want of proper care of such company it is liable, and any rule to the contrary, if not known to the passenger, cannot avail the company. *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 28 Am. and Eng. R. R. Cases, 148, 9 N. E. 615.

Of course the company's liability cannot be said to

end until after the passenger has safely reached his destination with all his effects.

Moreover, while it is true that a sleeping-car company, according to the authorities cited, is not liable as an innkeeper or common carrier while the passenger is occupying the berth assigned him in the car, and is himself in charge of his baggage, it does not follow, we think, that such company may not become responsible as a common carrier when it undertakes to discharge the duties of such before the end of the passenger's journey. It seems to us that when the appellant in this case delivered to the porter of the car her baggage to be by him carried to the reception room of the Union Depot at Indianapolis, and he undertook to do so, and took the same in his possession, the company became responsible as a common carrier for the safe delivery of the baggage intrusted to him, including the cape. The taking of the baggage by the porter was the acceptance of it by the company for the purpose of its delivery at the station. When the company by its porter undertook to deliver the baggage and the latter failed to deliver it, the company became liable the same as a common carrier would be liable to a passenger who had kept his baggage in his own custody on the train until he arrived at his destination, where it was taken in charge by a servant of the company, whose duty it was to take charge of it, and who never delivered it. Hence, granting that sleeping or palace car companies are not common carriers in the ordinary sense, and that as long as the baggage is retained by the passenger, such a company cannot be held accountable for it in case of loss, except it be through the negligence of the company, yet if they take the baggage into their possession or custody, they may, we think, in proper circumstances, be held to the duties and liabilities of common carriers.

If, as is held in *Pullman Palace Car Co. v. Pollock*, *supra*, the sleeping-car company's liability is similar to that of a common carrier of passengers when the passenger's baggage is retained in his own custody, then if the baggage be given into the custody of the sleeping-car company or its servants, the company will incur the same responsibility as a carrier of passengers. See Hutchinson on Carriers, section 690, *et seq.*

In *Richards v. Railway Co.*, 7 Man. G. & S., 62 E. C. L., 839, the facts were that plaintiff's wife was a passenger on a railway carriage, and that a dressing case which she was taking with her was placed in the carriage under the seat, and upon arrival at the station the porters undertook to carry the baggage from the railway carriage to the hackney carriage, which was to convey her to her residence, and that in this process of moving, the dressing case was lost. The question was whether it had ever been delivered to the company so as to make the latter liable, and the judges were all of the opinion that it had been, and that the plaintiff was entitled to a verdict.

A similar holding was made in *Bunch v. Great Western R. W. Co.*, 17 Q. B. Div. 215, where the plaintiff's wife, forty minutes before train time, went into the station where the railway porter took charge of her baggage, a portion of which was to be put in the car with her, of which she informed the porter. While plaintiff's wife was out of the station for a short time the part of the baggage which was to be taken in the car with her was found missing, and the defendant company was held liable, the court holding that as long as the passenger's baggage, although intended to be taken into the train with the passenger, is in the custody of the porter for the purpose of transit, either at the commencement or the conclusion of the journey, the railway company is the common carrier of it; but

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where it is put in the car and is partially under the control of a passenger, the company is no longer a common carrier, but is liable for negligence only. The case went to the House of Lords, where the verdict was sustained, Lord Bramwell alone dissenting. 13 App. Cas. (H. of L.) 31. See also *Butcher v. Railway Co.*, 16 C. B. 13; *Great North. R. W. Co. v. Shepherd*, 8 Exch. 30.

But if we are wrong in our conclusion that by reason of the delivery of the garment to the porter by the appellant, the Wagner company became liable as a common carrier, it cannot be denied, we think, that the facts found show a clear case of negligence. Sleeping-car companies are required at least to exercise reasonable care and watchfulness over the effects of their passengers, or guests, and if they are guilty of negligence in this respect, they must in proper cases respond in damages, and this is true even though the company attempt to relieve itself from responsibility by its own rule, posted up in the car, especially where the notice is not brought to the attention of the passenger. For an able discussion of this subject, see an article by W. F. Elliott, in 30 Cent. L. J. 248.

In a recent case decided by the Supreme Court of Georgia, it was held that when a passenger who has paid the customary fare on a sleeping-car, loses his property or the same is taken from his possession, it is *prima facie* negligence on the part of the company, and the burden is upon the latter to show that the loss did not occur by reason of a failure upon the part of its employes to exercise proper care over the property: *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. 186.

The doctrine there announced is eminently just and equitable, and applies with peculiar force, we think, to the case in hand. For an analogous holding in a case

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of a common carrier of passengers, see *Louisville, etc., R. W. Co. v. Nicholai*, 4 Ind. App. 119. The facts found specially are such as to show culpable negligence on the part of the servant of the Wagner company, and in the absence of any showing that the loss of the appellant's cape was not attributable to such act, the presumption of negligence becomes conclusive.

Hence, whether said company was responsible as a common carrier, or whether we regard its failure to deliver the cape to the appellant as a breach of duty, such as must be characterized as negligence, we are of opinion that upon the facts found specially there is a liability.

If we are correct in either view, the court erred in its conclusion of law that the Wagner company was not liable.

Judgment reversed, with directions to the court below to restate its conclusions of law in conformity to the views expressed in this opinion, to the effect that the appellee, The Wagner Palace Car Company, is liable to the appellant for the value of the cape.

ROSS, J., dissents.

DAVIS, J., did not participate in the consideration of this case.

ON PETITION FOR REHEARING.

REINHARD, J.—The learned counsel for appellee Palace Car Company have filed able and exhaustive briefs in support of their petition for a rehearing in which they seek to convince us in strong but courteous language that the conclusion reached in our former opinion is radically at variance with the doctrine as declared in the best considered American cases and should, therefore, not be permitted to stand. In view of the earnestness and evident sincerity with which counsel have discussed the questions in dispute, no less than the high regard we entertain for the learned

counsel and their standing in the profession, and the importance of the questions involved, we have devoted much time and careful study to a second examination of the case in its various phases and are constrained to say that we still regard the result reached in our original consideration as just and proper.

Counsel insist that we were in error with regard to the fact stated in the former opinion, that there was any agreement between appellant and the porter of the car company that the latter was to remove the appellant's cape or coat from the car, or that there was a complete delivery of the garment to the porter.

While the writer may have been a little unfortunate in the use of the word "agreement" respecting the circumstances of the removal of the property from the sleeping-car, it still remains true, we think, that the special findings of the court show fully and conclusively that the appellant's luggage, including the garment referred to, was given in charge of the porter just before the train stopped at the Union Station in Indianapolis, and that he took the same in charge and undertook to remove it from the car for the appellant in accordance with the rules of the company. In support of this statement we refer to the following findings of the court:

"VIII.—That said train arrived at Indianapolis on the day aforesaid about one hour late, and just before the arrival at the Union Station in the city of Indianapolis, the porter of said car, assisted by the plaintiff, collected all of said luggage together, including said seal skin cape or coat, in said section convenient for removing from the train. The porter, with the knowledge of the plaintiff, placed the seal skin cape on the back of the seat she occupied, and arranged the balance of her luggage in two bundles, preparatory to carrying all of the same out of the car.

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"IX.—Without the station the sun was shining brightly and the day was very warm, and the plaintiff was suffering from a temporary headache and fatigue owing to her long journey, at the time of such arrival, but was fully conscious of everything going on; and upon the train coming into the Union Station at said city from the lightness without and the darkness within, the plaintiff was unable to see objects within the car readily and distinctly, owing to the construction and extent of the train sheds and station at said point, but with the use of some additional effort and care all objects in the car were visible. After said luggage was so collected and arranged the plaintiff paid no further attention to it, but left it all to the care of the porter.

"X.—During all of said journey plaintiff was traveling alone, and upon the arrival of the train at the station at Indianapolis, the porter of said car attempted to remove from the car to the station all of the said luggage of the plaintiff, including said seal skin cape or coat, which was so undertaken with the knowledge, consent and express permission of the conductor of said car, and in accordance with the usual rules and custom of said Wagner Palace Car Company in such case."

If this was not an express agreement it was so by the fairest implication arising from the conduct and acts of the parties. These acts and conduct not only import an agreement but an actual attempt to execute the same by the removal of the property, in furtherance thereof, and they lack no element whatever which goes to make a complete delivery. This is true, unless it can be said that when the porter took charge of the luggage he had no authority to do so and was acting entirely outside of the apparent scope of his employment. That, however, cannot be, if for no

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other reason than the one contained in the finding last above set forth that "the porter attempted to remove from the car to the station all of the said luggage of the plaintiff, including said seal skin cape or coat, *which was so undertaken with the knowledge, consent and express permission of the conductor of said car, and in accordance with the usual rules and customs of said Wagner Palace Car Company in such case.*"

If, as counsel insist, "there is nothing in the record to show that sleeping-car companies make a common practice of removing the baggage of passengers from their cars to stations," there is nevertheless here an express finding that this sleeping-car company made such a practice and that it was in accordance with "its usual rules and customs" to do so. It will hardly do to say that in spite of this custom and rule the appellant would be bound by some rule of the company to the contrary, of which the passenger had no actual knowledge or information, so far as the findings disclose, although it may have been posted in a conspicuous place in the car.

But if there were no such finding, as that the porter undertook to remove the cape in accordance with the rules of the company, we think we could still take judicial knowledge of the fact that sleeping-car companies have porters whose duty it is to assist the passengers with their baggage on and off the cars, and we apprehend that if the appellee's porter had refused to remove the luggage of the appellant, under the circumstances of this case, and she had reported him to the company he would have been promptly dismissed from appellee's employment. We have not said, and do not now declare that the porter must remove all the luggage of every passenger from the car, but we do say, and in this we think every official of the appellee who is connected with the sleeping-car service

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will bear us out, that if a lady passenger is about to leave the car at the end of her journey, having traveled all the way from New York to Indianapolis, and being the only passenger in the car, and having with her a considerable quantity of luggage which it would be burdensome and difficult for her to carry, it is the duty of the porter to assist her by removing such luggage or as much thereof as she cannot conveniently carry, from the car; and we are further of the opinion that when any portion or article of such luggage has been thus taken in charge by the porter, the car company, in whose service such porter is engaged, becomes responsible therefor, and if after it has gone into the custody of such servant such article is lost or stolen, the company is bound by every principle of right and justice to account for its value. If it be said that the strict rules of law rendering an ordinary carrier of passengers liable as an insurer of baggage consigned to its exclusive care and custody on the journey cannot be applied, we answer that the company is nevertheless liable as the ordinary railroad company would be liable for the baggage of its passengers not given into its exclusive possession, by reason of the negligence of the servant in the handling of the baggage. We think not only the English cases, but the American decisions cited in our former opinion abundantly support this doctrine. The facts upon which the court below rendered judgment in favor of the company are all before us in the special finding, and they are, in our view, such as can lead to but one conclusion, that being the negligence of the company's servant.

Counsel, in the printed brief submitted, earnestly contend that the porter in such a case as this is "a mere gratuitous bailee." We do not so regard it. We are here dealing with a loss which was the direct re-

sult of the negligent performance of an act of a servant which the trial court finds was performed in accordance with the usual rules and customs of the master in whose service he was then engaged, and hence, within the scope of the servant's employment. The performance of this act was by the clearest implication included in the accommodations for which the injured party had contracted with and paid the master. To say that such an act was but the result of a private arrangement between the injured party and such servant, for which nothing had been paid, is, in our judgment, radically unsound. Indeed, it appears to us that the application of the rule governing mandates or gratuitous bailments to a case like this would be a perversion of an otherwise wholesome doctrine to the accomplishment of a most unconscionable result, enabling a party to escape a responsibility which by every consideration of justice it ought to bear.

Counsel also contend that the mere loss of personal effects by a passenger on a sleeping-car is not *prima facie* evidence of negligence on the part of the servants of the company. While this may be a correct rule in the abstract, it does not apply to the case in hand. The facts offered show more than "the mere loss" of the appellant's property. They also disclose the circumstances under which the loss occurred, and we think they are such as to conclusively render the company guilty of negligence.

But counsel complain that we did not state in the former opinion in what manner the porter was negligent. We thought we had made this sufficiently plain. He undertook to remove the appellant's cape from the car, according to the rules and customs of the company. He took the cape in charge for that purpose, but failed to do so, and it was lost. This was negligence. Moreover, it is difficult to conceive how

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the cape could have been lost without the collusion of appellee's servants, or the positive wrong of one of them, while the porter was out of the car with appellant's baggage, or a portion of it, without being watched by the conductor. We are not required to presume that the appellant's garment vanished away in some supernatural manner. If the facts found are true, no human being had access to it without being observed by the servants of the appellee, save the porter and the conductor, during the time the train stopped at the station. The appellant's property was lost without any fault on her part. No one knew or or could reasonably be held to have known what became of it but the porter and conductor. The inference is obvious and irresistible that it was lost either through the positive wrong or the inexcusable negligence of the company's servants, for which the company should respond in damages.

The petition is overruled.

DISSENTING OPINION.

'Ross, J.—I am unable to concur in holding either that the appellee, the Wagner Palace Car Company is liable as a common carrier, or that a duty was owing to appellee from it, which it neglected to perform.

The substance of the facts found by the jury in their special verdict, after finding that the appellee railroad company, with other railroad companies, formed a line from New York City to Indianapolis; that appellant purchased a ticket from the former to the latter point, and entered a car belonging to the appellee, the Wagner Palace Car Company, attached to the train upon which she took passage, having previously purchased a ticket entitling her to the use of a section in said car, are as follows: That at

Galion, Ohio, she was transferred from said car in which she had ridden from New York, to one which carried her to Indianapolis; "that at the time of the transfer the plaintiff had with her her luggage, among other things, a sealskin cape of the value of \$250.00, which with her other luggage, was, by the porter of the sleeping-car in which she arrived at Galion, transferred with herself to said car destined for Indianapolis; that during all of said journey upon the said car of the defendant, the Wagner Palace Car Company, the plaintiff had with her, luggage as follows: Two hand valises, one dressing case, and one umbrella, in addition to the sealskin cape, all of which were by the respective porters of said cars placed in the section occupied by the plaintiff; that said train arrived at Indianapolis about an hour late, and just before the arrival in said Union Station in said city of Indianapolis, the porter of said car, assisted by the plaintiff, collected all of said luggage together, including said sealskin cape, in said section for removing the same from the train. The porter, with the knowledge of the plaintiff, placed the sealskin cape on the back of the seat she occupied. After said luggage was so collected and arranged, the plaintiff paid no further attention to it, but left it all to the care of the porter. During all of said journey the plaintiff was traveling alone; and upon the arrival of the train at the station at Indianapolis, the porter of said car attempted to remove from the car to the station all of said luggage of the plaintiff, including said sealskin cape or coat, which was so undertaken with the knowledge, consent, and express permission of the conductor of said car, and in accordance with the usual rules and custom of said Wagner Palace Car Company in such cases. Said porter left in the section so occupied by the plaintiff in said Wagner palace car, the said sealskin

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cape or coat, and did not carry the same therefrom with said other luggage, and did not at any time deliver the same to the plaintiff, but, on the contrary, failed and omitted to remove the same from the car, and failed to deliver the same to the plaintiff. Said sealskin cape, as the plaintiff and porter passed from said car, was resting upon the back of the seat of the section so occupied by the plaintiff, and was not removed therefrom by either the plaintiff or said porter, but both passed from said car without either removing the same. The plaintiff relied upon the service of the porter in delivering said luggage to her, and at the same time believed he had collected and was removing all of the same from the car, and had no knowledge that any part of her luggage had been left in the car until immediately after the porter had returned to the car, when the plaintiff for the first time discovered that the sealskin cape had not been delivered to her. From the point at which the plaintiff and said porter alighted from said car in the train sheds to said point in said waiting-room where the porter delivered said baggage to the plaintiff, the distance was about 300 feet. During the time said train stopped in said station one door of the car was kept locked. The other door, through which the passengers were permitted to pass in and out of the car, was continuously guarded and watched by the conductor of the car, then and there an employe of the Wagner Palace Car Company. Said train, with car attached, remained in the station after arrival, before departing for St. Louis, fifteen minutes. When the porter returned to the car, after assisting the plaintiff with her luggage to said north door of the depot, he immediately reentered said car and examined the section which had been occupied by the plaintiff, but did not find said cape in said section, or upon the back of the

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seat so occupied by the plaintiff, nor was said cape thereafter found by said porter or the conductor of said car; that during the trip of the plaintiff from Galion to Indianapolis, all of said luggage in the car with plaintiff remained in the section so occupied by her, and the defendants, or either of them, by employes, servants or otherwise, did not take the same into possession in other manner than as stated in the previous findings; that in addition to the said luggage with the plaintiff in the car, she was traveling with other luggage, not with her in the car; that the time occupied by the porter in passing from the car to the station at Indianapolis to said north door of the depot building with the plaintiff, and returning to the car, was four or five minutes; that the defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, did not have any employe or servant in the Wagner palace car that the plaintiff was a passenger in, but said defendant's train conductor in charge of the train to which said car was attached did have supervision over said car, including the conductor and porter of said car. Said conductor and porter were in the employ and service of the Wagner Palace Car Company."

It is also found in the special verdict that under the rules of the company neither it nor its servants would undertake to be custodians or guardians of the personal effects, wearing apparel, or valuables of passengers, and its servants were forbidden from saying or doing anything that might lead passengers to understand that it would insure absolute security, and that "under no circumstances will baggage, wearing apparel or other property of passengers be taken charge of by any employe of this company."

From the facts found by the jury it appears that the appellee's contract with the Wagner Palace Car Com-

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pany was that she might occupy a section in its sleeping-car from New York City to Indianapolis; and it also appears that she did occupy such section in one of its cars and that with her and in her possession she had a number of articles of baggage including a seal-skin coat or cape; that upon the arrival of the train at Indianapolis the porter undertook to assist appellant with her baggage from the car and into the station waiting-room, which was 300 feet distant, but that he failed to pick up and take with him the seal-skin coat which appellant had; that after he returned to the car he could not find the coat.

It is a matter of common knowledge that sleeping-car companies do not undertake to transport either persons or property from one place to another. In fact, the transportation, not only of those who have hired the use of apartments in a sleeping-car, but of the sleeping car itself, is done by a railroad company. The railroad company, and not the sleeping-car company, contracts for the carriage of each passenger and receives the compensation therefor. The sleeping-car company is not therefore a carrier and is not liable as such.

If the appellant had been injured by the derailment of the train on which she was being carried she would have had no right of action against the appellee, the Wagner Palace Car Company, for its contract was not one to carry her safely, but was simply to furnish a berth in which to sleep at night and a seat in which to sit during the day, and her right of action, if any she would have, would be against the appellee, the railroad company with which company she had contracted to be carried safely to Indianapolis.

The obligation resting on the appellee, sleeping-car company, under its contract with the appellant, was to furnish her with the accommodations contracted

for and to use reasonable care to protect her and her property from harm until she reached Indianapolis, and then to assist her with her baggage in alighting from the train. It did not undertake to be responsible for her baggage in any other manner or to any greater extent than this, either in or out of its car. Neither did it agree to deliver such baggage to her at any place away from the car. The original contract, it is evident, is not sufficient to make the appellee, the Wagner Palace Car Company, liable for appellant's coat.

In Hutchinson on Carriers (2d ed.), section 700, the author after quoting from a number of cases in which the rule of liability is defined relative to steamship companies, railroad carriers, etc., says: "But that if passengers by land vehicles, such as railway trains, retain in their custody any part of their baggage, to the exclusion of the carrier's control over it, the latter can be held liable for its loss only when it has been occasioned by his negligence."

It is true that in the case of *Richards v. Railway Co.*, 7 Man. G. & S. (62 E. C. L.) 839, cited in the majority opinion, it was held that the railway company was liable for a loss of a part of the passenger's baggage while its servants were assisting the passengers in transferring such baggage from the car to a hackney coach, but that case was especially disapproved in the later case of *Bergheim v. Great Eastern R. W. Co.*, 3 C. P. Div. 221. In this latter case, the plaintiff Bergheim, after purchasing his ticket, requested the porter of the railway company to take charge of his baggage and put it on the train for him while he went to a refreshment room. The porter put the baggage on the seat of the compartment the plaintiff was to occupy and locked the door of such compartment. When the plaintiff returned the porter unlocked the door and

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the plaintiff on entering the compartment, found that a bag which he had given to the porter and which had been placed in the car was missing. It was held that the plaintiff could not recover. The railway's servant not having been negligent there could be no liability, unless it was liable as a common carrier, and that it was not liable as such.

In the case of *Bunch v. Great Western R. W. Co.*, 17 Q. B. Div. 215, cited in the majority opinion, the doctrines announced in the case of *Richards v. R. W. Co.*, *supra*, was followed.

In *Talley v. Great Western R. W. Co.*, L. R., 6 C. P. 44, while the case was decided against the plaintiff on account of his negligence in leaving his baggage in the car while he alighted for refreshments, Willis, J., says: "There is great force in the argument that where articles are placed with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier, which is founded on the bailment of the goods to him and his being intrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them." In *Stearn v. Pullman Car Co.*, 8 Ont. 171, the plaintiff sued to recover money abstracted from his pockets while he was asleep in one of the company's cars, in which he had paid for a berth. On the trial there was no evidence that the company had been negligent in any way, unless that fact was to be inferred from the fact that his money was taken while he was sleeping in the defendant's

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car; and the court held that no negligence was shown and that he could not recover.

In *Dargan v. Pullman Palace Car Co.*, 2 Wilson (Tex. App.), p. 607, 26 Am. and Eng. R. R. Cases, 149, the court says: "While it is well settled that sleeping-car companies are to be regarded neither as innkeepers nor common carriers, nor subject to the onerous liabilities of either in respect to the property of those enjoying their accommodations, it is equally well settled that it is their duty to exercise ordinary care for the security of passengers' valuables. * * * The invitation to make use of the berth carries with it an invitation to sleep and an implied agreement to take reasonable care of the guest's effects while he is asleep." But, says the court: "Appellant's right to recover in this action therefore depends upon the want of ordinary care on the part of the appellee to protect the valise and its contents against loss. It devolved upon him to prove such want of care. Failing to make this proof he could not legally claim to recover."

In *Whitney v. Pullman's Palace Car Co.*, 143 Mass. 243, 9 N. E. 619, which was an action to recover for the value of a satchel and its contents, lost by plaintiff from her seat in one of the company's cars, the court says: "She had with her a small satchel or reticule, which she did not deliver to the defendant or any of its agents, but which she kept in her personal control. There was evidence to show that it was stolen while the train in which she was riding was stopping at Portsmouth, New Hampshire, for refreshments. It is clear that she cannot hold the defendant liable as a common carrier. She can only hold it liable upon the ground that her property was lost by some negligence of the defendant, and without any fault on her part."

The English cases are all cases arising between railway companies as common carriers, and their pas-

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sengers, and the questions decided, all have reference to the railway companies' liability as common carriers. In this country, however, where the action is against a sleeping-car company for the value of personal baggage or the loss of money stolen from one occupying a berth in its car, the courts, with one exception, universally hold that the company is not liable as a common carrier, or as innkeepers; that the exact relation which the company bears to those hiring the use of the car is not definitely settled, but that it is its duty to use reasonable care to see that the effects of those occupying its cars are not stolen. To this extent do the holdings go, and no farther, except in the one case to which I shall call attention shortly. In addition to the authorities quoted from as sustaining my views that the appellee, the Wagner Palace Car Company, is not liable unless it failed to perform some duty which it owed to the appellant, in other words, that it was not an insurer, but is liable only in the event that it has been in some manner guilty of negligence, I cite *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 9 N. E. 615, 28 Am. and Eng. R. R. Cases, 217; *Pullman Palace Car Co. v. Gardner*, 3 Penny. (Pa. Sup.) 78, 16 Am. and Eng. R. R. Cases, 324; *Carpenter v. New York, etc., R. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 47 Am. and Eng. R. R. Cases, 421; *Barrott v. Pullman's Palace Car Co.*, 51 Fed. 796; *Pullman Palace Car Co. v. Garin*, 93 Tenn. 53, 58 Am. and Eng. R. R. Cases, 585; *Pullman Palace Car Co. v. Freudenstein*, 3 Colo. App. 540, 58 Am. and Eng. R. R. Cases, 589.

It may be conceded as settled, as already stated, that a sleeping-car company impliedly undertakes to use reasonable care to protect the baggage and effects of its patrons from being injured or stolen, and yet it does not undertake that no dishonest person shall

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enter or procure accommodation in its cars, for it has no means to ascertain whether or not one applying for accommodations is honest. Its undertaking is simply to use reasonable care to see that while one person sleeps or is temporarily absent from his berth or seat that another shall not injure or appropriate his property. And it is not sufficient to make the company liable, simply to show the loss of the property; but there must be evidence tending to prove that it was negligent in some duty owing to the patron.

The case which, as heretofore stated, is an exception to the rule is that of *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. 226, cited in the prevailing opinion. In that case the court by Maxwell, J., holds that the law imposes upon a sleeping-car company the same duties as are imposed upon an innkeeper, and makes it subject to the same liabilities.

In this State the question is apparently settled in harmony with the great weight of the authorities as above cited, for in the case of *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474, the court says: "In *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153, 32 Am. R. 57, it was thought not to be necessary, for the purposes of the case, 'to determine whether the appellant is to be regarded as a common carrier or otherwise.' It would seem that this question is not presented for decision in the case at bar; for the court at special term expressly decided in its conclusions of law upon the facts found, that the appellant was not responsible as a common carrier, and that it could not be held to the liability of an innkeeper. * * * But it may properly be remarked that it is apparently settled by the decided cases to which our attention has been directed, that sleeping-car companies are not liable, either as innkeepers or common carriers, for personal goods stolen from the person of an occupant

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of a berth in a sleeping-car. *Welch v. Pullman Palace Car Co.*, 16 Abb. (N. S.) 352; *Palmer v. Wagner*, 11 Alb. L. J. 149; *Plum v. Pullman Sleeping-Car Co.*, 13 Alb. L. J. 221; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. R. 258." After quoting from a number of authorities showing that the rule applicable to such companies was that they should be liable only for the want of reasonable care in the protection of the property of their patrons, the court holds that in that case the company was liable because it was found that the company's servants had been negligent in the performance of the duties owing to Mr. Diehl by reason of which his money had been taken from his pocket while he slept.

In the case at bar the appellant's counsel concedes that there can be no recovery on account of any negligence shown, but they insist "that the property being lost while in possession of the sleeping-car company, that the sleeping-car company is responsible as an insurer in the same manner that an innkeeper is responsible for the safe protection and delivery to the owner of any property put in its possession by a patron." And they say: "We of course bear in mind that the Supreme Court of this State in *Woodruff Co. v. Deihl*, *supra*, declined to hold sleeping-car companies liable, 'either as innkeepers or common carriers for personal goods stolen from the person of an occupant of a berth in a sleeping-car.' * * * And so we contend that judgment should be ordered in favor of the plaintiff for the reason that at the time the cape was lost it was in the hands of the defendants as common carriers."

If the majority opinion does not proceed upon the theory that the appellee, the Wagner Palace Car Company, is liable as a common carrier, as the appellant insists, can it be said that because it agreed to

furnish appellant with a berth the responsibility of an innkeeper attached to it?

Judge Thompson in his work on *Carriers of Passengers* (p. 530, section 20), says: "It seems to be settled by the few adjudged cases upon this subject that sleeping-car companies are to be regarded neither as innkeepers nor common carriers, nor subject to the onerous liabilities of either in respect of the property of those enjoying their accommodations. It is evident that these flying nondescripts do not come within the definition of an inn: 'it must be a house kept open publicly for the lodging and entertainment of travelers in general, for a reasonable compensation. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn.' The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits; and it seems that it would be such an extension to apply it to the class of cases under discussion. Thus, the keeper of a coffee house, or private boarding or lodging house, is not an innkeeper in the strict sense of the term."

In the case of *Pullman Palace Car Co. v. Smith*, *supra*, which was an action brought by Smith against the company, to recover a sum of money stolen from him while occupying a berth in its car, the trial court instructed the jury that if they found from the evidence that the plaintiff's money was stolen from him while he was sleeping in the company's car, he was entitled to recover. On appeal to the Supreme Court, after stating that the question involved was whether or not the company was liable as an innkeeper, says:

"Kent, in defining an inn, says: 'It must be a house kept open publicly for the lodging and entertainment

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of travelers in general, for a reasonable consideration. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn.' 2 Kent Com. 595. This is substantially the same definition as is given in all the books upon the subject.

"But the keeper of a mere coffee house, or private boarding or lodging house, is not an innkeeper, in the sense of the law. *Id.* 596; *Dansey v. Richardson*, 3 Ellis & B. 144 (E. C. L., vol. 77); *Holder v. Toulby*, 98 E. C. L. 254; *Kisten v. Hilderbrand*, 9 B. Mon. 72. It must be a common inn, that is, an inn kept for travelers generally, and not merely for a short season of the year, and for select persons who are lodgers. Story on Bailm., section 475, and cases cited in note. The duty of innkeepers extends chiefly to the entertaining and harboring of travelers, finding them victuals and lodgings, and securing the goods and effects of their guests; and, therefore, if one who keeps a common inn refuses either to receive a traveler as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king. 3 Bac. Ab. Inns and Innkeepers, C. The custody of the goods of his guest is part and parcel of the innkeeper's contract to feed, lodge and accommodate the guest for a suitable reward. 2 Kent Com., 592.

"From the authorities already cited, it is manifest that this Pullman palace car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company, that of an innkeeper.

"It does not, like the innkeeper, undertake to ac-

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commodate the traveling public, indiscriminately, with lodging and entertainment.

"It only undertakes to accommodate a certain class, those who have already paid their fare and are provided with a first-class ticket, entitling them to ride to a particular place.

"It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. There is a dining car attached to the train, as shown, but not owned by the Pullman company, nor run by them. It belongs to another company, the Chicago and Alton Dining Car Association. Appellant, as we understand, furnishes no accommodation whatever, save the use of the berth and bed, and a place and conveniences for toilet purposes. We would not have it implied, however, that even were these eating accommodations furnished by appellant, it would vary our decision; but the not furnishing entertainment is a lack of one of the features of an inn.

"The innkeeper is obliged to receive and care for all the goods and property of the traveler which he may choose to take with him upon the journey. Appellant does not receive pay for, nor undertake to care for, any property or goods whatever, and notoriously refuses to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made.

"The same necessity does not exist here, as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and intrust his goods and baggage into the custody of the innkeeper. But here, the traveler was not

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compelled to accept the additional comfort of a sleeping-car; he might have remained in the ordinary car; and there were easy methods within his reach by which both money and baggage could be safely transported. On the train which bore him were a baggage and express car, and there was no necessity of imposing this duty and liability on appellant.

"It cannot be supposed that any such measure of duty or liability attached to appellant, as is declared in the quotation cited from Bacon's Abridgment to belong to an innkeeper. The accommodation furnished appellee was in accordance with an express contract entered into when he bought his berth ticket at Chicago, which was for the use of a specified coach from Chicago to St. Louis, and appellant did not render a service made mandatory by law, as in the case of an innkeeper.

"But if it should be deemed that, on principle merely, this company would be required to take as much care of the goods of a lodger, as an innkeeper of those of a guest, the same may be said with reference to the keeper of a boarding house, or of a lodging house. In *Dansey v. Richardson*, *supra*, where the innkeeper's liability was refused to be extended to a boarding house keeper, it was said by Coleridge, J.: 'The liability of the innkeeper, as, indeed, other incidents to his position, do not, however, stand on mere reason, but on custom, growing out of a state of society no longer existing.' In *Holder v. Toulby*, *supra*, where it was held the law imposed no duty upon a lodging house keeper to take due care of the goods of a lodger. *Calye's Case*, 8 Co. Rep. 32, was designated as *fons juris* upon this subject, where it was expressly resolved that, though an innkeeper is responsible for the safety of the goods of a guest, a lodging house keeper is not. And in *Parker v. Flint*, 12 Mod. 255,

'if,' says Lord Holt, 'one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and, as such, is not under the innkeeper's protection; but if he eat or drink there, it is otherwise, or if he pay for his diet there, though he do not take it there.'

"The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant."

In *Welch v. Pullman Palace Car Co.*, 1 Sheld. (N. Y.) 457, it appears that the plaintiff hired a berth in one of the company's cars to be used by him while traveling from Detroit to Buffalo. When he retired he placed his overcoat in the vacant berth above him and hung up other articles in or over his berth, which was the usual way of disposing of such for the night. When the train arrived at Buffalo his overcoat was missing. There was no evidence of negligence on the part of the company or its servants, except the mere fact of the loss of the coat. The court, by Sheldon, J., says: "It cannot, truthfully, be contended, that there was any delivery of the coat into the custody of the defendant, different from the delivery of it that he would have made to the railroad company, had he elected to travel by the ordinary cars. He carried it with him to wear or to put off, as the exigencies of his health or the weather required. There was no place to deposit it, and he sought none, nor was it expected that one would be provided."

"Upon these facts the defendant should not be held liable. It is unnecessary to remark that the extra payment made to the defendant, procured for the plaintiff, many other comforts and luxuries, besides that of lying down and sleeping if he chose. He ob-

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tained comparative protection for himself and his property, and immunity from disturbance during the passage. These facts afford no solution of the question. But the fact exists, that the most discreet and vigilant officer of a car cannot prevent depredations, and if this duty is imposed by law, it is impracticable to meet the responsibility, and the law requires nothing unreasonable or unjust of any member of society.

"It is sought to charge the defendant with the responsibility of the innkeeper, upon the assumption, that the law implied a contract or imposed a liability of the same nature. That responsibility, was declared by the civil law to be as strict and severe as that of common carriers, and modern jurisprudence has adopted and applied the principle. But it went no further, as is sought to be done in this case. The liability of the innkeeper arises out of facts which do not exist in this case. He cannot lawfully refuse to receive guests to the extent of his reasonable accommodations, nor can he impose unreasonable terms upon them. The necessities of the traveler required these just rules to be adopted. As a compensation for the responsibility thus incurred, he has a lien upon all the property of the guest at the inn for all his expenses there. There are no facts in this case, justifying the application of such rules of law. The defendant could not be compelled to receive and entertain passengers, however amenable it might be upon its contract with the carrier, and it had no lien for the price of the accommodations. The traveler voluntarily, and not of necessity, availed himself of what was placed before him for his comfort, and he cannot cast the burden of care and diligence upon the defendant, neither is it right or just that the law should do so. Unless the courts can determine, after the

most mature consideration, that it is required to apply some general, well settled principle of the common law, to a new case arising out of circumstances or emergencies, developed by the progress of society, so that common justice may be subserved and enforced among the people, it should refrain from making the application."

In *Blum v. Southern Pullman Palace Car Co.*, 1 Flip-pin (U. S.), 500, the plaintiff sought to recover for money stolen from him while asleep as a patron in one of the defendant's cars. The court after alluding to the responsibility and liability of innkeepers says: "There are good reasons for not extending such liability to the proprietor of a sleeping-car.

"1st. The peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection.

"2d. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping-car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment.

"3d. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping-car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those.

"4th. The innkeeper is bound to furnish food as well as lodging and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping-car furnishes a bed only, and that, too, usually for a single night. It furnishes no food and receives no luggage in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

"5th. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping-car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

"6th. The innkeeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employes of the train to collect fares and control its movements.

"7th. The sleeping-car cannot even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of its rules and regulations.

"I hold, therefore, that sleeping-car companies are not subject to the responsibility of innkeepers at common law, and that defendant cannot be held liable upon that ground."

In this case the sleeping-car company, by the terms of its contract with appellant did not in addition to furnishing her with a berth and the accommodations of its car also agree that it would, after her arrival at her destination accept her baggage and wraps and guarantee their safe delivery to her in the waiting room of the station. That was not its duty and al-

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though she may in good faith have intrusted to appellee's porter the charge and control of her effects, believing that he would deliver them safely to her in the waiting room of the station, that belief could create no liability on the part of the appellee. The company must either have undertaken, by its original contract with the appellant, to be answerable to her for her baggage and wraps, or else under the facts in this case there can be no liability on its part.

"What, then, shall be the measure of responsibility of these companies? All the cases seem to agree that their duty is to exercise at least ordinary care for the security of passenger's valuables. Of course, this care must be in proportion to the danger reasonably to be apprehended. Such danger is greater at night, while the passenger is asleep, than in the daytime, when he is awake and can care for himself." *Thomp. Carr. Pass.* 531.

In *Pfaelzer v. Pullman Palace Car Co.*, 4 Wkly Notes Cas. (Pa.) 240, the plaintiff sought to recover the value of a valise and contents which he left with the porter of the defendant's sleeping-car in which he had paid and held a ticket for a berth. He gave his valises to the porter, who was sitting on the steps of the car, saying: "I am going to the water closet for a few minutes, I leave these valises in you charge!" He returned in a few minutes, when he could find but one valise the other being missing. The porter denied all knowledge of it. The plaintiff was nonsuited. *Thayer, P. J.*, in answer to plaintiff's counsel, said: "In order to recover, you must show negligence, and to do this you must prove the nature and extent of the authority. * * * Your contract of carriage was with the Railroad Company, and the effect of your contract with the Palace Car Company was merely to give you the privilege of sleeping in the car; had there been a

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stoppage of the train, no action would lie against it therefor—it is not a common carrier.”

In the case of *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. 154, the plaintiff sued to recover money stolen from him while occupying a berth in the company's sleeping-car, there being no evidence of negligence on the part of the company's servants, it was held that the company was not liable because negligence on its part could not be presumed from the mere fact that the money was stolen while the plaintiff was a patron in its car.

And the Supreme Court of Mississippi, in its opinion in the case of the *Illinois Central R. R. Co v. Handy*, 63 Miss. 609, which was an action brought to recover \$300.00 abstracted from a pocketbook lost by the plaintiff while a passenger in the company's chair car, says:

“Because of the invitation extended to travelers by sleeping-car companies to sleep upon their cars, it has been held that they owe and assume to their patrons the duty of exercising such reasonable guard over them, to prevent theft of their personal effects, as the circumstances admit and the passenger has a right to expect. This obligation is not such as pertains to common carriers or innkeepers, and such companies do not occupy the relation of insurers against all loss under all circumstances. The accommodation offered implies a certain degree of privacy for the passenger upon his retirement to rest, an intrusion on which by the servants of the company would be rightly resented by him. If the company should be held liable to one passenger for a theft committed by another, it must be either upon the ground that it is, under the common law liability of an innkeeper, a view not sanctioned by any court, so far as we are informed, or because by its contract it may be fairly

said to bind itself to keep watch upon each traveler on its car, which would result in the establishment of a system of intolerable espionage. One who avails himself of the comfort afforded on such cars does so with full knowledge of the facts that others, whose character the company cannot possibly know, may become fellow travelers with himself, and that the arrangement of the car into berths or sleeping chairs is such that he will necessarily, while asleep, be subjected to easy approach by any dishonest traveler in the same car. The risk of loss from such persons he assumes as an incident of his circumstances, and the company can only be made responsible by evidence of its neglect to keep that reasonable guard which its contract implies that it will."

In *Rott v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199, the court says: "The settled law is, that a sleeping-car company is not the insurer of the baggage of the passenger, but that its liability, at most, is that of a bailee for hire. In the case of the loss of a passenger's baggage or belongings it is, therefore, liable, if at all, only on the ground of negligence; and, in order to be so liable, it must have been negligent in the performance of some duty which it assumed to perform for the passenger. That duty, so far as adjudged cases seem to have gone, is, that it will maintain in the car a reasonable watch during the night while the passenger is asleep. We now go further, and, speaking with reference to the facts of this case, we hold that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him nor watch himself while he is absent from his berth in

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the washing-room, preparing his toilet after arising in the morning."

In the prevailing opinion it is not clearly stated whether the company is liable because it was a duty owing by the company to its patrons to accept the effects and upon demand deliver them safely, or whether the company is bound because its porter entered into a new contract by which he undertook in person to transport her effects from the company's car to the waiting-room in the station. If it is based upon the former it is contrary to the holding of the court in *Woodruff, etc., Coach Co. v. Diehl, supra*, and the many other cases cited except the case of *Pullman, etc., Co. v. Louc, supra*, which as I have already stated is contrary to all of the other adjudications in this country on the subject. If the company's liability is made to depend upon the special undertaking or contract of the porter it is equally untenable for the reason that he had no power to make such contract which would be binding upon the company. At best the porter was but the mere servant of appellant, undertaking without hire, or it might be in anticipation of a tip, to carry her baggage and coat from the car to the waiting room of the station.

Everybody does, or, at least, ought to know that sleeping-car companies do not empower the porters of their cars to make contracts for the company. If this particular porter was vested with special powers and could make contracts for the company, that fact should have been proven and found by the jury. Without such proof the presumption is that he had no such power.

But the majority of the court seem to think that although the rules of the company specially forbid its employes from assuming to take charge of or be responsible for the baggage, wearing apparel or valu-

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ables of its patrons, nevertheless the appellant could not be bound by the rule because she had no knowledge of it. If it is the law that a patron of a sleeping-car company has a right to assume that the porter's power to bind the company is unlimited I must concede that the majority's opinion is right, but if the law does not admit of such an assumption I insist that the prevailing opinion is wrong, unless, as I have heretofore stated, the original contract between the company and the appellant imposed upon it the duty of guaranteeing to her the absolute security of her baggage, wearing apparel, etc. That the contract to furnish appellant a berth in appellee's sleeping-car did not also guarantee to her absolute security for her effects, wearing apparel and valuables, is settled by the many authorities already cited.

For these reasons I think the judgment of the court below should be in all things affirmed.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD
COMPANY v. BARNES.

[No. 1,852. Filed October 21, 1896.]

PLEADING.—*Complaint.*—*Contract.*—*Consideration.*—A complaint, based upon an oral contract which does not express or import a consideration, should specially allege what the consideration was. EVIDENCE.—*Pleading and Proof.*—*Variance.*—Evidence that defendant's superintendent, several weeks after plaintiff was injured while in defendant's employ, made a special contract with plaintiff that in consideration of the latter's releasing any claim for damages, defendant would pay him his wages during the time he was disabled, does not sustain a complaint on common count for wages.

From the Clark Circuit Court. *Reversed.*

E. C. Field, W. S. Kinnan and M. Z. Stannard, for appellants.

C. L. Jewett and H. E. Jewett, for appellee.

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REINHARD, J.—The appellee's complaint alleges that "the defendant is indebted to the plaintiff in the sum of \$118.00 as wages from the 1st day of March, 1889, to the 22d day of April, 1889, which the defendant promised and agreed to pay to the plaintiff with interest thereon" from the date last named. No bill of particulars was filed with the complaint. The pleading does not disclose whether the contract sued on was executory or executed. It may be true that the appellant promised and agreed to pay the appellee \$118.00 for wages during the period named, but that no services have ever been actually rendered by the appellee, and if so there could be no recovery, and the averment that the appellant was indebted for the sum would be but a legal conclusion. Webster defines "wages" as "compensation given to a hired person for services." The averment might, therefore, without a change of meaning be made to read that "the defendant is indebted to the plaintiff in the sum of \$118.00 as compensation for services which the plaintiff had been hired by the defendant to perform." But this would not make the averment any stronger for it would still fail to show that the services had been performed. If they had not been performed there would be no consideration for the promise to pay. Every contract in order to be valid, must stand upon a sufficient or valid consideration, and, as a general rule, the complaint declaring upon such contract must aver, and the evidence must show such consideration. Of course where a written contract is relied upon which discloses the consideration, or an oral one which imports it, it will not be necessary to aver the consideration more specifically in order to render the complaint sufficient. But if this is not the case the consideration must be pleaded or the complaint will not be sufficient. *Leach v. Rhodes*, 49 Ind. 291; *Nichols v. Now-*

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ling, 82 Ind. 488; *Higham v. Harris*, 108 Ind. 246; *Plunkett v. Black*, 117 Ind. 14.

Assuming, however, that the complaint discloses a valid cause of action, we pass to the consideration of the alleged error of the overruling of the appellant's motion for a new trial.

One of the grounds assigned for a new trial is the insufficiency of the evidence to sustain the verdict.

The verdict is a special verdict and follows the theory of the complaint that the appellant is indebted to the appellee for wages as a blacksmith.

The evidence shows without contradiction that the appellee prior to the time covered by the complaint and subsequent thereto was employed by the appellant as a blacksmith in its shops, and that his wages was twenty-six cents per hour, ten hours being considered a day's work.

About the 1st day of March, 1889, the appellee received a personal injury, while in appellant's service, which disabled him for work during the period covered by the complaint, except that he worked one day during that period. The appellee testified that when he was injured he made an agreement with Mr. Watkeys, the superintendent of the work in which the appellee had been engaged, that if he would not sue the company, and would sign a release for any claim he might have against it for damages on account of said injury, the company would pay him his regular wages. He testified in part as follows: "He told me the company would pay me the damages, or rather they would allow me my wages just the same as I was paid when at work, my regular wages, twenty-six cents an hour, during the period I was laid up, which was from the 1st day of March, until the 22d day of April, 1889. When I made this agreement with Mr. Watkeys he said I would be kept on the pay rolls of the company

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and be allowed my regular wages if I would not sue the company and sign the release. That is the reason I did not sue the company on account of my injuries. I made this agreement with Mr. Watkeys about a month before I went back to work."

Assuming, without deciding, that Watkeys, by virtue of his position as superintendent in the appellant's service, had sufficient authority to enter into such an agreement with appellee and thereby bind the appellant, we think it is apparent that this is not the contract declared upon in the complaint. If the complaint can be held sufficient at all, it must be on the theory that it declares upon the common count for services rendered the appellant. The case made by the evidence establishes no such indebtedness, but discloses a special contract to the effect that in consideration of appellee's releasing the appellant from the payment of any damages the appellant would pay him at the rate of \$2.60 per day during the time he was disabled, which, appellee says, was from the 1st day of March until the 22d day of April, with the exception of one day, during which he attempted to work, but found he was not able to do so.

There is, therefore, a total failure of proof as to the services counted upon in the complaint, unless it can be said that appellant owes the appellee for the one day's services during which he attempted to work. Had the appellee shown that the appellant owed him for the value of a horse sold and delivered to it, the variance could not have been more complete.

The rule has been so frequently declared by the courts of this State that the plaintiff can only recover according to the allegations of his complaint that it seems fruitless to cite authorities in support thereof. See, however, *Riley v Walker*, 6 Ind. App. 622; *Thomas v. Dale*, 86 Ind. 435.

Appellee's learned counsel insist, however, that the fact that appellee continued in the service of the appellant as blacksmith, even though he performed little or no work, during the period of his disability, supports the theory of the complaint that appellant is indebted to him for wages. It is urged that if the superintendent continued to carry him on the pay rolls, the latter was in the scope of his authority to hire and discharge hands, and so long as he continued to retain the appellee in the appellant's service, the liability for wages continues.

There is, however, no evidence that appellee simply continued to remain in appellant's service and was carried on the pay rolls. The appellee testified that he did not know whether his name was on the pay rolls or not, although he says Watkeys agreed to keep it there. His own evidence shows that he made the agreement with Watkeys about a month before he went back to work for the company, which according to the dates given, was about the 22d day of March, 1889, which shows that the agreement was made some twenty-two days after he was injured. It is not claimed that during this period of twenty-two days he continued in the services of the appellant, unless the effect of the agreement was to operate retroactively and relate back to the time between the receiving of the injury and the making of the agreement. It would be an anomaly to hold that this was a continuation in the service. From whatever view we may look at this agreement nothing can be made of it but a special contract that in consideration of the release the appellee was to receive a certain amount of money,—an amount equaling the wages which he would have earned during the period of his disability. It is the same as if Watkeys had agreed that the company would pay him \$118.00 for the release. Whether he

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would be entitled to recover in an action on the special contract it is not necessary to decide, as that would involve an examination of the further question whether Watkeys was authorized to bind the appellant by such a contract, and if not, whether the appellant would still be liable in an action *ex delicto* for the damages incurred by appellee.

If it could be held, however, that in any event the appellant is liable for the one day's service rendered by him during the period of his disability, then we think the verdict is largely excessive, and as this was also assigned as a cause for a new trial, the motion should have been sustained on that ground.

Our conclusions is that there was error in the overruling of the motion for a new trial.

Judgment reversed, with direction to sustain the appellant's motion for a new trial, and to grant leave to the parties to amend their pleadings, if asked for.

MORRISON & Co. v. BOARD OF COMMISSIONERS OF
DECATUR COUNTY.

[No. 1,952. Filed May 26, 1896. Rehearing denied October 21, 1896.]

COUNTY AUDITOR.—*Contract for Election Supplies.—Liability of County.*—A county auditor has no authority to bind the county by an order for poll books, tally sheets, and other election supplies to be furnished eighteen months in the future, and for an election to be held more than eleven months after the expiration of his term of office.

From the Decatur Circuit Court. *Affirmed.*

S. B. Eward and D. A. Myers, for appellants.

B. F. Bennett and Thomas E. Davidson, for appellees.

DAVIS, C. J.—At the general election in 1890 John J. Puttmann was elected auditor of Decatur county,

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and entered upon the discharge of his duties for a term of four years on the 17th of November, 1891. On the 3d of April, 1891, James Kennedy, then the auditor of said county, wrote appellants in response to a letter from them, requesting them to furnish poll books, tally papers and election blanks for said county for the November election of 1892, which order was then accepted by appellants at the agreed price of \$162.47. On September 12, 1891, bids were submitted to the board of commissioners of said county for the furnishing of stationery, books and blanks for said county for a period of three years, and one Caskey was the lowest bidder and a contract was then accordingly duly entered into with him, and said Caskey, under said contract, did furnish all the blanks used for election purposes in said county in November, 1892. On September 12, 1891, when said contract was entered into with Caskey, appellants had not expended any labor or money in making said blanks or any part thereof previously ordered by said Kennedy. In October, 1892, appellants shipped said supplies to appellee, but appellee did not accept or use the same, or any part thereof, but immediately notified appellants of the refusal of appellee to accept the same, and requested appellants for directions as to what disposition to make of said blanks. At the time of making the contract with Caskey in September, 1891, appellee had no knowledge of the order given by said Kennedy to appellants. On the 12th of September, 1891, appellants were present for the purpose of competing with said Caskey and others for the privilege of furnishing said stationery, blanks, and books, but said appellants did not bid, or if they did their bid was withdrawn before the award was made for furnishing the same, and they were not present when the contract was let to said Caskey.

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It is conceded that Caskey, under his contract, furnished the supplies for the election in 1892, but one position of appellants appears to be that his contract did not cover the supplies embraced by the order given to them by Kennedy. It is not controverted, however, that Caskey and appellee construed the contract between them as covering such supplies, and that in fact he did furnish the same under his contract. Appellants do not pretend that they were ignorant at any time of the contract entered into between Caskey and appellee, nor of the construction placed thereon by the parties thereto.

The only question presented for our consideration is whether, under the circumstances, the county is liable for the supplies shipped by appellants in October, 1892, for use at the November election of that year, on the order made by the auditor in April, 1891, which supplies were not accepted or used by appellee. The judgment of the trial court was against appellants.

In our opinion no reason has been shown that would justify this court in reversing the judgment.

The order was given by the auditor after his successor had been elected and within a few months of the expiration of his term of office. The supplies in question were not to be used until one year after the expiration of his term of office. No reason has been suggested for giving the order so long in advance of the time when the supplies would be required. Moreover, five months after the order was given and fourteen months before the election, the board of commissioners entered into a contract with another to furnish supplies required in the conduct of public business. At this time appellee had no knowledge of the order given by the auditor to appellants. It is conceded that at this time appellants had done nothing in pursuance of the order, and the circumstances in-

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dicating that appellants had good reasons for believing that appellee and the successful bidder construed the contract between them as including the election supplies in question.

Counsel for appellants insist that the appellee is liable, under the provisions of section 6203, Burns' R. S. 1894, and that the act of 1885, relative to the purchase of books, stationery and other articles for the several county officers and for the conduct of public business has no application. 1 R. S. 1876, p. 352.

Without construing these statutes we may assume, for the purpose of this case, "If the work was done in the interest of the people of the county," appellee would be "liable for the reasonable value of the work and supplies so performed and furnished." *Board of Commissioners v. Menaugh*, 13 Ind. App. 311.

In this instance the "work and supplies so performed and furnished" did not inure to the benefit of the "people of the county."

If the supplies had been used they would have been "in the interest of the people of the county," and the appellee should have paid at least the reasonable value therefor. If the auditor has power as the county's agent in the discharge of the duties of his office, in any case, to order or purchase a suitable number of blank forms of poll books and also forms of election returns, and also all other proper blanks necessary to be used in an election, the county can only be liable for his contract in relation thereto when such power is exercised by him while acting within the scope of his authority. In our opinion in any view of the case, the auditor was not acting within the scope of his authority in giving such an order for such supplies after his successor had been elected, shortly before the close of his term of office and more than eighteen months before the day of election at which

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the blanks were to be used. The county is not liable on the contract of the auditor for the reasonable value of the supplies. We are inclined to the opinion, although this question we do not determine, that the county commissioners of the respective counties in this State are the agents of their counties for the purchase of all books, stationery and all other articles necessary for conducting the business of the county officers, including "a suitable number of blank forms of poll books," etc., to be used in all elections hereafter held in this State.

Judgment affirmed.

ON PETITION FOR REHEARING.

DAVIS, C. J.—Counsel for appellants insist that in stating the substantial facts out of which this controversy arose, we did not take into consideration the reply. In this position counsel are in error, but we have again carefully examined the answer to which the demurrer was overruled and the reply to which the demurrer was sustained. In the reply it is averred that at the time the order was given to appellants by Kennedy "there was no existing contract or order given by the defendant, nor by any one else acting for the defendant, for the furnishing of books, blanks, etc., as provided in and called for by said order." It is also averred in the reply that the contract with Caskey did not cover the books, blanks, etc., covered by order of said Kennedy, but the fact that Caskey "under said contract did furnish all the blanks used for election purposes in Decatur county, Indiana, for the holding of the general election in said county, held in November, 1892," is not controverted.

The substance of the reply is, "that at the time said order was given, as aforesaid, and at no time since has

there been a valid and binding order or contract for the furnishing of the books, blanks, etc., mentioned in said order for said county," and therefore, notwithstanding the supplies furnished by appellants under Kennedy's order "were not used by the defendant," but were in fact furnished by Caskey under his contract, the county should pay appellants for said "books, blanks, etc.," because it was "a part of the duties of said auditor to make out and furnish to inspectors of elections of the several precincts of said county said blanks," etc. Whether the contract with Caskey was a valid and binding order for such supplies or not is not material, in view of the fact that it clearly appears from the averments in the answer and reply that Caskey did furnish the same to the county under such contract. In any event it is clear, under the conceded facts, that Kennedy was not acting within the line of his duty and the scope of his authority when in April, 1891, he ordered blanks for the election in November, 1892.

As stated in original opinion, his successor who was elected in 1890 entered on the discharge of the duties of the office in November, 1891. Assuming that it was a part of the duties of the auditor to make out and furnish the supplies to the inspectors of the election, Kennedy had no authority to bind the county by an order for such supplies to be furnished more than eighteen months in the future for an election to be held more than eleven months after the expiration of his term of office. Such an order as that given to appellants by Kennedy under the undisputed facts and circumstances of this case as disclosed by the answer and reply, when considered most favorably in behalf of appellants, is void so far as the county is concerned as against public policy. Such contracts cannot be upheld or enforced by the courts.

The petition for a rehearing is overruled.

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THE INDIANA, ILLINOIS AND IOWA RAILROAD, COMPANY
v. MASTERSON.

[No. 2,107. Filed October 22, 1896.]

RAILROADS.—Passenger on Freight Train.—Contributory Negligence.

—A passenger on a freight train who leaves her seat to get a drink of water for her child is not guilty of contributory negligence so as to preclude a recovery for damages caused by a negligent stopping of the train.

SAME.—Passenger on Freight Train.—Assumption of Risk.—A passenger on a freight train does not assume the risks growing out of the negligent operation of such train.

SAME.—Ticket Purchased in One State, Tort Occurring in Another.

—The fact that a passenger purchased his ticket in Illinois does not support the proposition that the company is not liable for a tort in Indiana.

From the Starke Circuit Court. *Affirmed.*

H. K. Wheeler and *A. I. Gould*, for appellant.

J. W. Nichols and *C. C. Kelley*, for appellee.

DAVIS, C. J.—This was an action by the appellee against the appellant for damages for injuries alleged to have been caused by the negligence of the appellant. A trial by jury resulted in a verdict and judgment in favor of appellee for \$600.00.

Several errors have been assigned, but three questions only are discussed by counsel for appellant.

1. That appellee was guilty of contributory negligence.

2. That appellee assumed the risks which caused her injury when she took passage upon the freight train.

3. That appellant is not liable because the injury occurred in Illinois.

The evidence is in some respects conflicting, but

there is evidence in the record fairly proving that appellee was, when injured, a passenger upon appellant's freight train; that by the negligent application of the air-brake the caboose was suddenly stopped in such a manner as to violently shake and jar the passengers from their seats, throwing appellee to the floor, injuring her in such a manner as to cause a miscarriage, and that such injury occurred in Indiana. In particular there is evidence showing that on one occasion she was standing in the act of getting a drink for her child, when by reason of the negligent application of the air-brake she was suddenly and violently thrown across the seat, severely hurting her and almost knocking her senseless. In this connection it is proper to say there was evidence of witnesses claiming to be experienced railroad men tending to prove that the engineer is, under ordinary circumstances, able to stop a freight train by the proper application of the air-brake without causing sudden and violent stopping, jerking or jarring of the caboose. In this instance the engineer had no actual knowledge of the fact that there were passengers in the caboose, although it was a common practice for appellant to accept and carry passengers on this freight train. The negligence of appellant, however, is not controverted on this appeal.

1. We are not prepared to say, as a matter of law, that under the circumstances of this case a passenger on a freight train who leaves her seat to get a drink of water for her child is guilty of contributory negligence. *Pittsburgh, etc., R. W. Co. v. Klitch*, 11 Ind. App. 290, *Marion St. R.R. Co. v. Carr*, 10 Ind. App. 200; *Louisville, etc., R. W. Co. v. Costello*, 9 Ind. App. 462; *Louisville, etc., R. W. Co. v. Sears*, 11 Ind. App. 654; *Wahl v. Shoulders*, 14 Ind. App. 665.

2. It is next insisted that she assumed the risks.

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Conceding that she assumed the risks incident to the usual and ordinary jerking and jarring of the caboose in stopping the freight train, she did not, in our opinion, assume the additional and extraordinary risks growing out of the negligence of the employes on account of the improper application of the air-brake in such a manner as to suddenly and violently stop, jerk, and jar the caboose, throwing her across the seat and throwing other passengers from their seats.

We know of no principle of law under which the courts could hold that she assumed the risks growing out of the negligent operation of the freight train. The jerking and jarring of the caboose incident to the ordinary operation of the freight train did not cause her injury. The proximate cause of her injury was the sudden and violent stopping, jerking and jarring of the caboose occasioned by the negligence of the employe in charge of the train in the improper use and application of the air-brake.

3. Counsel for appellant next insist that the injury occurred in Illinois, and that the laws of Illinois govern the liability as to the injury, and that there is no evidence as to what the laws of Illinois were.

The journey commenced in Illinois and ended in Indiana. There was evidence justifying the inference that there was a continuous series of wrongful acts in both states, but that the specific wrongful act which caused the injury occurred in Indiana. The jury so found,⁹ and we would not be justified in setting aside the verdict on this ground.

The gravamen of the action is the negligence of appellant. The contract gave her the rights of a passenger. The negligence of appellant which caused the injury was a violation of the duty which the company owed appellee as a passenger.

The fact that the contract was made in Illinois does

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not support the proposition that the appellant is not liable for the tort in Indiana. The action was properly prosecuted in Indiana. *Burns, Admr., v. Grand Rapids, etc., R. R. Co.*, 113 Ind. 169, 176; *Cincinnati, etc., R. R. Co. v. McMullen, Admr.*, 117 Ind. 439.

We find no reversible error in the record.
Judgment affirmed.

GEIGER, TRUSTEE, EX REL. NEWMAN, ROAD SUPERVISOR *v.* HUENNEKE.

[No. 2,285. Filed October 23, 1896.]

APPEAL.—Review of Instructions.—Evidence Not in Record.—Statute Construed.—Under section 642, Burns' R. S. 1894, providing that on appeal it shall not be necessary to embrace the entire record, but only such parts as will enable the appellate tribunal to understand the particular question involved, and under Rule xxix of the appellate court, providing that where the evidence is not all in the record, the trial judge must certify that there was competent evidence introduced at the trial material to the point covered by the instructions, etc., the correctness of instructions given or refused will not be considered on appeal in the absence of such certificate from the trial judge, unless the evidence is in the record.

From the Ripley Circuit Court. *Affirmed.*

M. R. Connelley, T. L. Creath and J. B. Rebuck,
for appellant.

James H. Connelley, for appellee. •

REINHARD, J.—The only question attempted to be presented by the record arises upon the correctness of certain instructions given and refused. The evidence is not in the record, nor is there any certification by the judge that there was evidence material to the point covered by the instructions. The statute provides that any question of law may be reserved at the

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trial for the decision of the Supreme Court, and it shall not be necessary to embrace the entire record, but only such parts as are necessary to enable the appellate tribunal to understand the particular question involved. Section 642, Burns' R. S. 1894 (630, Horner's R. S. 1896).

Rule XXIX of this court and Rule XXX of the Supreme Court require that when such question arises upon the giving or refusal of instructions it shall be sufficient to incorporate in the record all the instructions given and refused, "together with the statement of the judge that there was competent evidence introduced at the trial material to the point covered by the instructions, relevant to the questions involved and tending to sustain the theory of the party who believes himself aggrieved by the ruling of the court."

No question can be made upon the correctness of instructions given or refused, unless either the entire evidence is contained in the record, or there is a compliance with the provisions of the statute and rule above alluded to, or unless there is sufficient evidence in the record to show affirmatively that the instructions given were wrong or those refused proper, or unless the instructions given are so radically wrong as not to apply to any supposable case which might have been made by the evidence. *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334; Elliott's App. Proced., section 193, and cases there cited. For aught we know from the record in the present case, the evidence may have been such as would have authorized the instructions given.

Moreover, in the motion for a new trial the appellant has assigned the alleged ground or cause for the motion jointly or collectively, and not severally, and the same is true with respect to the instructions refused. The seventh cause for a new trial alleges that

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"the court erred in refusing to give instructions asked for by the plaintiff numbered 1, 2, and 3, on its own motion." And the eighth cause specifies that "the court erred in giving on its own motion instructions numbered 2, 3, 4, 5, 6, 7, 8, and 9." There is no attempt to show that any of the instructions were wrong except the seventh and eighth.

As to the instructions requested and refused, they may, of course, all have been proper under a given state of the evidence, but as that is not in the record, and no statement of the kind required under the statute and rule of court above referred to, we cannot say whether the instructions refused, or any of them, would have been correct if given.

Judgment affirmed.

ROBERTSON v. HAMILTON.

[No. 1,442. Filed October 23, 1896.]

EVIDENCE.—*Res Gestae.*—*Slander.*—On the trial of an action for slander brought by a married woman, based upon a statement of the defendant that the plaintiff had been guilty of adultery with one C, the defendant produced a witness by whom he proved that sometime before the time of the alleged slander witness met the plaintiff and her husband in the public highway; that plaintiff was crying, and upon being asked by witness what was the matter, she replied that her husband could tell him; that after further conversation showing that there had been some trouble or misunderstanding between them, the plaintiff asked witness to take her husband and keep him over night. Defendant offered to prove that after the witness had started away, and in the absence of the plaintiff, the husband told witness that his wife had confessed to having been guilty of adultery with C. *Held*, that the evidence offered was not a part of the *res gestae*, and was inadmissible. *pp. 330-332.*

SAME.—*Character.*—*Specific Acts.*—Evidence of specific acts of lascivious or immoral conduct of a woman five or six years prior to her alleged adultery with a man other than the one with whom such acts were committed, is not admissible to prove her bad character for chastity. *p. 333.*

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From the Vigo Superior Court. *Affirmed.*

J. E. Lamb and J. T. Beasley, for appellant.

George W. Faris and S. R. Hamill, for appellee.

DAVIS, C. J.—This was an action for slander. The gist of the complaint is that appellant falsely charged that appellee, a married woman, had illicit carnal intercourse with one Ed. Cummings.

The appellant answered in two paragraphs. First, justification, that appellee had “illicit carnal intercourse with one Ed. Cummings.”

Second, general denial.

A trial by jury resulted in a verdict and judgment for \$750.00 in favor of appellee.

We have read the voluminous record, including all the evidence given on the trial, in the light of the argument of learned counsel, and find two questions properly and ably presented for our consideration on this appeal.

1. The fifth and twelfth reasons for a new trial relate to the action of the court in refusing to permit the appellant to prove, by Sol. Craig, a conversation had by the witness with the husband of the appellee, in her absence, in which the appellee’s husband told the witness that appellee had confessed to her husband that she had been guilty of having illicit carnal intercourse with Ed. Cummings.

It is not claimed that the statements or admissions of the husband to said Craig were at any time communicated to appellant or that his charge against appellee was based on her alleged confession to her husband.

The witness, Craig, testified that in the month of April, 1893, he met the appellee and her husband in the public highway in the vicinity of their residence; that her husband had been very sick with a severe at-

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tack of the gripe for several weeks prior thereto and that he was then convalescing, but was not well and that the witness then believed that he was slightly off mentally, and that the witness could not say that he did not know what he was saying; and that the appellee was crying.

The witness said to her: "What is the trouble, Ollie?" She replied: "Charley can tell you." In the same connection she said: "I don't know what is the matter, he acts so strange, and he is wanting to go to Mattoon, and I don't want him to go, and he says he is going to leave," and that he had tried to kill himself that morning. This conversation was in the afternoon or evening. In the course of the conversation her husband said to her, "Ollie, I want you to tell Sol. now whether I am to blame for any of this trouble or not." Appellee answered that he was not. She asked the witness to take her husband home with him and keep him all night.

Appellee's husband got in the wagon with the witness and they drove away. Appellant's counsel then asked the witness this question: "After he got in the wagon with you tell the jury whether he made any statement as to the trouble and what it was about, whether he did or not?"

An objection of counsel for appellee was sustained to the question.

Counsel for appellant then offered to prove by the witness that as soon as appellee's husband got in the wagon with the witness he stated to the witness that his wife had confessed to him that she had betrayed him, that she had been too intimate with Ed. Cummings, and pointed out to the witness the place in the road where she had made the confession. The court excluded the evidence, and to which ruling appellant at the time excepted.

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Counsel for appellant insist that the statements of appellee's husband were a part of the conversation begun with the appellee, and that they were admissible as part of the *res gestae*.

When the alleged confession was made by appellee, whether on that day or on some previous day is not disclosed. The statements of the husband to the witness in relation to the alleged confession of his wife were, in our opinion, no more than a mere narrative of a past occurrence, and therefore were not admissible on the trial in behalf of appellant as a part of the *res gestae*. *Parker v. State*, 136 Ind. 284; *Citizens' Street R. R. Co. v. Stoddard*, 10 Ind. App. 278; *Cleveland, etc., R. W. Co. v. Sloan*, 11 Ind. App. 401.

It is next insisted that she directed her husband to continue the conversation with the witness, and therefore that his statements to the witness were admissible in evidence against her.

The general rule is, that the admissions of a third person are admissible in evidence against a party who has expressly referred another to him for information regarding a disputed or uncertain matter. In such cases there must be a disputed or uncertain matter which is the subject of inquiry, and there must be a clear and direct reference to the third person for the desired information. In order to bind the party by the admission of a third person, the reference must have been made by the person sought to be bound with the definitely stated intent by the person making the reference, that the person making the inquiry should secure of the third person the desired information regarding a disputed or uncertain matter.

There is nothing in the conversation between appellee, her husband and the witness indicating that there was any matter in dispute between any of the parties.

The only indication of any trouble appears to have

been the fact that appellee was crying. The inquiry of the witness was prompted by reason of the uncertainty as to the cause of the trouble. So far as shown the witness had no interest in this uncertainty, and his inquiry appears to have been prompted solely by curiosity. The conversation in her presence, when considered as an entirety, strongly indicates that her crying was the result of the strange conduct of her husband, to which she referred, and that she was ignorant as to the cause of such conduct. She said in response to her husband's question that he was not to blame for the trouble. She did not, however, intimate to the witness that she was in any manner responsible for the trouble. In response to the question of the witness she said, "I don't know what is the matter, he acts so strange," etc. Her reference of the witness to her husband for information was not in direct terms with a definitely stated intent, but was permissive only in character. The substance of her statement to the witness was that she did not know what was the matter, but that her husband might explain the matter to the witness if he could. She did not intimate that she had made a confession to her husband which he was at liberty to communicate to the witness, and she did not refer the witness to her husband for information on such subject.

Whether such a confession made by a wife in confidence to her husband can in any case be proven in this manner is a doubtful question. In any event, in our opinion, the rule relied upon by counsel for appellant is not applicable under the facts and circumstances as disclosed by the record.

2. The sixth, seventh, and eighth reasons for a new trial all relate to the refusal of the court to allow the appellant to prove that in 1887 the appellee said that she dearly loved one Black, and that she thought more

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of him that she did of her husband, and that on one occasion she threw her arms around his neck and kissed him. The witness was then a domestic in the service of appellee and her husband, and said Alf. Black was then living in the family and working for her husband.

This was five or six years prior to appellee's alleged acquaintance and illicit intercourse with said Ed. Cummings.

Counsel for appellant insist that the evidence was admissible as tending to establish her character for chastity and the probability that the appellee would have been guilty of the acts charged with Cummings. In other words, the contention is that in such cases the character of the woman for chastity may be attacked by proof of specific acts of lascivious or immoral conduct. Assuming that there may be cases in which specific acts of lascivious or immoral conduct may be proven there was no error in the ruling under consideration.

In deciding a similar question in *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, this court, by Reinhard, C. J., said: "We do not think there was any error in this ruling. True, the appellee's character was put in issue. But this can be proved only by general reputation, and not by specific acts of immorality, wholly disconnected from the acts charged in the publication."

The fact that appellee may have had an undue affection for Alf. Black in 1887, or that she was then guilty of unbecoming conduct with him in the presence of others, did not tend to prove that she had illicit carnal intercourse with Cummings in 1892 or 1893.

The act with Black, which appellant offered to prove, was wholly disconnected from the conduct with Cummings.

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On a careful reading of the evidence we are not favorably impressed with the merits of this action, but we fail to find any error in the record that would justify a reversal of the judgment of the trial court.

Judgment affirmed.

LAKE ERIE AND WESTERN RAILROAD COMPANY
v. RINKER.

[No. 1,885. Filed November 5, 1896.]

PLEADING.—*Complaint.*—*Stock Killed on Railroad.*—A complaint for damages against a railroad company for the unlawful killing of an animal, based upon sections 5312-5318, Burns' R. S. 1894, sufficiently avers that the animal was killed in the county where the suit was brought, where it is alleged that the defendant operated a railroad between two certain municipal corporations within the county, and that said animal was on said company's right of way, having entered at a point where said right of way was insecurely fenced, etc.

HARMLESS ERROR.—*Evidence.*—*Opinion.*—The improper admission in evidence of an opinion of a witness on a matter to be determined by the jury, is harmless error, where facts, conclusively showing the witness to have been right in his opinion, are proved by five other witnesses, and such facts are not contradicted.

From the Delaware Circuit Court. *Affirmed.*

J. B. Cockrum, A. W. Brady and Rollin Warner,
for appellant.

E. M. White, J. G. Leffler and W. L. Ball, for
appellee.

REINHARD, J.—The appellee brought this action against the appellant to recover damages for the alleged killing of a cow upon appellant's railroad track, said cow having entered upon the track at a point where the same was not securely fenced. There was a jury trial and a verdict in appellee's favor for \$65.00.

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From the judgment rendered upon such verdict this appeal is prosecuted.

The following errors are assigned:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The court had not jurisdiction over the subject of the action.
3. The court erred in overruling appellant's demurrer to the first and second paragraphs of the complaint, and each of them.
4. The court erred in overruling appellant's motion for a new trial.
5. The court erred in overruling appellant's motion in arrest of judgment.

Originally the complaint was in two paragraphs. At the trial, the second paragraph of the complaint was dismissed, thus leaving the first paragraph alone in the record.

The cause of action, as stated in the complaint, is based upon an alleged failure of the appellant to comply with the requirements of the act of 1877, sections 5312-5318, Burns' R. S. 1894 (4025-4031, R. S. 1881). This is not controverted by appellant.

It is insisted that the complaint is fatally defective in failing to aver that the animal was killed in the county of Delaware. Under the statute upon which this section is based, the complaint must show the animal was killed in the county in which the action was instituted. *Louisville, etc., R. W. Co. v. Johnson*, 11 Ind. App. 328, and cases cited. The question as to such omission may be raised by demurrer, or assignment of error for the want of jurisdiction, or by motion in arrest of judgment (*Louisville, etc., R. W. Co., supra*), but not by a demurrer for want of sufficient facts to constitute a cause of action. *Lake Erie & West-*

ern R. W. Co. v. Fishback, 5 Ind. App. 403; *Chicago, etc., R. W. Co. v. Wheeler*, 14 Ind. App. 62.

In the present case the question is properly raised by the motion in arrest and by assignment of error that the court below did not possess jurisdiction of the subject of the action.

We think, however, the complaint sufficiently shows the appellee's cow was killed in Delaware county. It is averred in the complaint in substance that the appellant operated a railroad in Delaware county, Indiana, between Muncie and Oakville, in said county, and that while said cow was on said corporation's right of way and railway track, having entered the same at a point where said line of road and line of way was insecurely fenced and insufficient to keep out stock, etc., she was struck and hit by the appellant's locomotive and train of cars, was thrown from said railroad track, and killed.

It thus appears by the clearest implication that the animal was killed in Delaware county. If the appellant's road was in that county, as is averred, and the animal was killed upon said road or track, it must have been run down and killed in the county also.

It is further contended that the court erred in permitting a witness to testify that a certain cattle guard maintained by the appellant, was not a sufficient cattle guard to turn and keep stock off of appellant's right of way.

The objection to such testimony is that it is only the opinion of the witness, and that, too, upon a matter to be determined by the jury. *Indiana, etc., R. W. Co. v. Hale*, 93 Ind. 79; *Chicago, etc., R. R. Co. v. Modesitt*, 124 Ind. 212; *Toledo, etc., R. R. Co. v. Jackson*, 5 Ind. App. 547.

It would certainly not have been error, had the

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court excluded the testimony, even if we concede that the witness was an expert. Was it error to admit it?

Besides this witness, five other witnesses testified to facts conclusively showing the insecure and unsafe condition of the cattle guard, and there was no conflict in their testimony upon this point. The appellant introduced no evidence to the contrary. The evidence was therefore uncontradicted and but one inference could have been drawn from it, viz: that the cattle guard was insufficient to keep out stock. Granting, therefore, that the opinion of the witness referred to should not have been allowed to be given, we do not perceive how the appellant could have been harmed by the ruling.

Some complaint is also made of the instructions given, but upon examination we find them correct.

Judgment affirmed.

MULLEN v. PUGH.

[No. 1,694. Filed November 24, 1896.]

LANDLORD AND TENANT.—Construction of Lease.—A lease for one year with the agreement that if lessee should prove to be a satisfactory tenant and should do what was right the lessor would again rent the premises to him for another year, cannot be construed as a leasing of the premises for an additional year.

SAME.—Ejectment.—Equitable Lien for Improvement.—Under a lease for one year which stipulates that should the lessee prove satisfactory as a tenant and do what was right the lessor would rent him the premises for another year, and which stipulates further that lessee might build a house on the premises, for which lessor would pay lessee whenever his tenancy should cease, the lessee has an equitable lien upon the real estate for the value of a house built, and a court of equity will protect him in possession of the real estate until he is paid for the value of the improvement so made.

From the Fountain Circuit Court. *Reversed.*

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E. F. McCabe, for appellant.

J. Frank Hanly, for appellee.

DAVIS, J.—This was an action to recover possession of real estate. Appellant, who was defendant in the court below, appeals from the judgment rendered against him in said cause. The error relied upon for reversal is the act of the court in rendering judgment in favor of appellee on the special verdict.

The special verdict shows that appellant, Mullen, rented of appellee, in 1892, a farm for one year, from March 1, 1893, to March 1, 1894, with the agreement that if appellant "should be satisfactory to the said agent, as a tenant, and should do what was right, the plaintiff would again rent and lease said premises to him for another year."

The special verdict also shows that it was agreed in said contract that said appellant "might go at once upon said premises, and that he might build a house thereon, and that whenever his tenancy should cease, the plaintiff would pay him, the said defendant, for said house."

It is also found that appellant entered upon said premises pursuant to said contract, and built a house worth \$90.00, and built a barn worth \$25.00, and that appellee refused to lease said premises to him for another year.

There is no finding that appellant did not farm the land properly, nor is there any finding that he was not in fact satisfactory as a tenant.

The appellee has not paid or offered to pay appellant for said house.

Counsel for appellant insists:

1. That appellant was entitled to hold the premises, as tenant, under the terms of his contract, for another year, from March 1, 1894.

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2. That appellee could not maintain a suit for possession until she paid or tendered appellant payment for his house.

In support of the first proposition the argument of counsel is that appellant was entitled to the benefit of his contract; and that under the terms of this contract he was entitled to hold possession until March 1, 1895. Whether he was satisfactory as a tenant and did what was right does not appear. It is clear, however, that the appellee refused to "again rent and lease said premises to him for another year." Therefore, the contract, in the light of the facts found, cannot be construed as a leasing of the premises to appellant for another year.

Whether he could maintain an action for damages for breach of contract, or what his rights would have been if it appeared that he was satisfactory as a tenant and had done what was right, we need not determine.

In support of the second proposition counsel for appellant contends:

1. That the agreement to pay for the house was a concurrent condition of the contract which she was bound to perform before she could recover possession.

2. That the agreement to pay for the house was a covenant that run with the land and gave appellant an equitable lien thereon and the right to retain possession until that lien was satisfied.

Whether this contract to pay for the house was a covenant which runs with the land we need not determine. This is an action between the original parties to the contract, and, in our opinion, under the peculiar circumstances of this particular case, the appellant has an equitable lien upon the real estate for the value of the house built by him thereon as a permanent improvement under the terms of his lease, and

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that a court of equity will protect him in the possession of the real estate, on the terms provided in the lease, until he is paid for the value of the improvement. *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266.

In this case appellant built the house under the assurance that if he was satisfactory as a tenant and did what was right the appellee would lease said premises to him for another year, and that when his tenancy should expire the appellee would pay him for the house. For aught that appears, he was satisfactory as a tenant and did what was right and, under the circumstances, on her failure to rent the premises to him for another year, he should be treated as having an equitable lien upon the premises for his improvement and the right to retain possession in order to enforce such lien.

In this action the court can give him no relief on account of the barn. There was no agreement in the lease that he should be paid for the barn at the expiration of his tenancy.

Judgment reversed at appellee's cost, with instructions to modify judgment in such manner as to authorize appellant to retain possession in accordance with the terms of his contract until appellee pays him the value of the house.

BROWN ET AL. V HIATT.

[No. 2,021. Filed November 24, 1896.]

APPEAL.—Weight of Evidence.—The finding of the trial court will not be disturbed on appeal if there is any reasonable evidence to sustain it. *pp. 341, 342.*

HIGHWAY.—Abandonment.—The fact that part of a highway, as originally laid out, is not graded, graveled, and used as a passageway, does not constitute an abandonment thereof. *p. 344.*

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SAME.—Obstruction Fences.—Abandonment.—The obstruction with fences, of a public highway for a time by adjoining landowners does not constitute an abandonment of the highway. *p. 344.*

PRACTICE.—Admission of Evidence.—It is not error to exclude evidence offered on sur-rebuttal, which evidence was properly admissible in chief to sustain the defense. *p. 344.*

From the Tipton Circuit Court. *Affirmed.*

Thos. J. Kane and Ralph K. Kane, for appellants.

John F. Neal, for appellee.

Ross, J.—The appellee, Eliphalet C. Hiatt, brought this action against the appellant, Horace G. Brown, to declare and foreclose the lien of two assessments made for street improvements. The appellant, William H. Ramsey, the assignor of such assessment liens, was made a party to answer as to his interest. The appellee recovered in the court below, and the appellant, Horace G. Brown, has appealed to this court and has notified his co-appellant, William H. Ramsey, to join therein, but the latter has not joined in the appeal.

The court below made a special finding of facts, with conclusions of law thereon.

Two specifications of error have been assigned in this court, namely: First, that the court erred in its conclusions of law upon the facts found, and second, that the court erred in overruling the appellant's motion for a new trial.

It is urged that some of the facts found by the court and embraced in the special findings are erroneous, in that the evidence preponderates against such findings. Counsel do not intimate that there is no evidence to sustain the court's finding, but they say: "We are confident that the decided preponderance of the testimony shows" the facts to be different from what the court has found them to be. If counsel's statement is true "that the decided preponderance of the testi-

mony" tends to show a state of facts different from what the court has found, nevertheless, under the rule that prevails in appellate courts, we cannot disturb the finding if there is any reasonable evidence to sustain it. Counsel admit that there is evidence, which, standing alone, would warrant the finding, but simply insist that the preponderance of the evidence is to the contrary. The rule so firmly established in this jurisdiction, that the Appellate Court will not weigh the evidence and determine upon which side it preponderates, was adopted and has been adhered to upon the theory that the trial court, ever on the alert to protect the rights of all parties, and having noted the evidence as it was given on the trial, has concluded not only that the verdict or finding is supported by a preponderance of the reputable evidence, but that the verdict or finding is on the side of the real justice and equity of the case. The rule originated upon the theory alone that the trial court had done its duty in this respect, and on account of the advantages which it had over the appellate tribunal, to know the truth and the weight to be given to the testimony, it has been adhered to. True, cases sometimes come before this court wherein it seems the trial court has been unmindful of its duty and has sustained a verdict simply upon the theory that a jury having decided upon the weight of the evidence, that decision should not be disturbed, even though to the mind of the court the evidence preponderates the other way. When the trial court so rules it is unmindful of its duty and makes itself but a figure head in the trial of cases. While it is no doubt the duty and province of a jury to decide between conflicting testimony and determine the existence or nonexistence of a fact from a preponderance of the evidence, yet it is also the duty of the court, when asked, to review the evidence and determine

whether or not the jury have properly decided from a preponderance of the evidence. In this case the court below tried the case without the intervention of a jury; and in considering the evidence and making the finding we must assume that it gave the evidence the same careful scrutiny and consideration it would have bestowed had it been reviewing it after verdict. The trial court has decided that the worthy evidence establishes the facts as found, and inasmuch as the evidence is conflicting, that finding is binding upon this court.

The facts found by the court, about some of which there is a controversy, and which presents the questions urged on this appeal, are, that the street ordered improved was for many years prior to 1871 a public highway in Hamilton county, and in that year said highway and the adjoining lands were regularly annexed to and made a part of the city of Noblesville; that said highway was sixty-six feet wide, and was named and known as Anderson street; that in its improvement no part of appellant's land was taken or appropriated, and that no proceedings were ever instituted to appropriate appellant's land, nor were any damages paid, assessed or tendered him; that appellant's father, who was the owner of said property at the time the improvement was made, knew it was being done, but made no objection except that he sent by mail to the contractor doing the work a written notice notifying him that said city had no right to make the improvement, and that he would not pay any assessment. This notice was not received by said contractor until after he had commenced the work and had a large portion of the street graded. The findings as to the compliance with the law in making the improvement seems to be regular and complete.

We cannot concur in the view of appellant either

that a part of the highway in question was abandoned because not graveled and used as a passageway, or for the further reason that the adjoining landowners for a time, at least, obstructed it with their fences. Nor was it abandoned because the board of county commissioners granted to a toll-road company the right to use and occupy it for a toll-road and they only used part of it, to-wit, forty feet thereof, allowing the balance to grow up in grass, etc. There are few, if any highways in the State of Indiana that are actually used to their extreme width, and yet the fact that they are not graded, graveled and used to the extreme width does not indicate an abandonment of the part not actually used. Counsel say that this nonuser showed an abandonment and vacation. We think it insufficient to show an abandonment, especially in view of the fact that the public is now insisting that it never was abandoned. It never was vacated, because the court did not find that it was vacated, and our attention has not been called to any evidence showing that it was ever vacated by legal proceedings.

It is also insisted that the court erred in rejecting certain evidence offered by the appellant on sur-rebuttal. This contention is without merit, first, because no ruling is shown by the court upon which to base the contention, and second, this evidence, if admissible, should have been given in chief to sustain the defense pleaded in appellant's answer.

This disposes of all the questions urged for our consideration, and we find no error warranting a reversal of the judgment of the court below.

Judgment affirmed at the cost of the appellant, Horace G. Brown.

DAVIS, J., not participating.

Stark v. Owens.

STARK v. OWENS.

[No. 2,054. Filed November 24, 1896.]

APPEAL AND ERROR.—*How Evidence is Incorporated in Bill of Exceptions.*—It is only when the stenographer's report of the evidence with its incidents is incorporated in the bill of exceptions that the original bill may be certified as a part of the record on appeal. All other bills of exception must be copied by the clerk.

From the Monroe Circuit Court. *Affirmed.*

J. E. Henley and J. B. Wilson, for appellant.

J. H. Loudon and T. J. Loudon, for appellee.

DAVIS, J.—The only error assigned in this court is: "The court erred in overruling the appellant's motion for a new trial in this cause."

The only question discussed arises on the evidence. Counsel for appellee insist that the evidence is not in the record. No shorthand reporter was appointed in the court below to take down the evidence in shorthand, in pursuance of the provision of section 1470, Burns' R. S. 1894 (1405, R. S. 1881). No attempt has been made to bring the evidence in the record as provided in section 1476, Burns' R. S. 1894 (1410, R. S. 1881).

The evidence at the trial was taken in longhand, and was afterwards incorporated in a bill of exceptions, in accordance with the provision of sections 637-641, inclusive, Burns' R. S. 1894 (625-629, R. S. 1881). In making the transcript of the record for this appeal the bill of exceptions containing the evidence was not copied. Section 661, Burns' R. S. 1894 (649, R. S. 1881). The original bill of exceptions is incorporated in the transcript filed in this court.

Under the rule announced by the Supreme Court

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and followed by this court, the evidence is not in the record, and no question arising thereon can be considered or determined by us on this appeal. *McCoy v. Able*, 131 Ind. 417; *Gish v. Gish*, 7 Ind. App. 104.

It is only when the stenographer's report of the evidence with its incidents is incorporated in the bill of exceptions that the original bill may be certified up to this court as a part of the record. All other bills of exceptions must be copied by the clerk in order to make them a part of the transcript of the record on appeal.

As the original bill of exceptions containing the evidence is incorporated into the transcript of the record on this appeal, we cannot, as before stated, under authorities cited, determine the question sought to be presented for our consideration.

Judgment affirmed.

COLEMAN v. GOBEN ET AL.

[No. 2,070. Filed November 24, 1896.]

OFFICERS.—Collecting Illegal Fees.—Penalty.—Statute Construed.—

A borrower from the school fund, having failed to pay the interest on such loan for a number of years, paid to the county treasurer, on demand of the auditor, the two per cent. penalty required by section 5815, Burns' R. S. 1894, and the auditor issued warrants drawn upon the county revenue fund to the county attorney for services as attorney rendered in and about the collection of said penalty. *Held*, that no action would lie against the officers for the collection of illegal fees under section 6549, Burns' R. S. 1894.

From the Montgomery Circuit Court. *Affirmed.*

G. W. Paul and *H. D. VanCleave*, for appellant.

Finley P. Mount, Wright & Seller, Kennedy & Kennedy and *Crane & Anderson*, for appellees.

LOTZ, C. J.—The errors assigned in this case are the sustaining of the appellees' separate demurrers to the first and third paragraphs of the appellant's complaint.

These paragraphs are unskillful and bungling in their construction and contain many averments which have little, if any, relevancy to the cause of action attempted to be stated.

The substantial averments, as we gather them, are about as follows: The appellant was a borrower from the school funds of Montgomery county, and had executed two mortgages upon real estate to secure the loans. He had failed to pay the interest thereon for a number of years. The appellee, Goben, as the auditor of the county, in requiring him to pay the delinquent interest demanded the two per cent. damages, as required by the terms of the mortgage and by section 5815, Burns' R. S. 1894. This penalty the appellant paid to the appellee, Johnson, who was county treasurer, and Goben issued a quietus therefor to appellant. The appellee, Mount, was the county attorney, and Goben issued warrants to Mount for his services as attorney rendered in and about such collections. These warrants, however, were not drawn upon the money paid by the appellant, but upon the fund known as county revenue.

The statute, section 6549, Burns' R. S. 1894, provides that if any county, township or other public officer shall obtain any fee or sum of money denied him by law the person aggrieved shall have an action against such officer for the recovery of such money, together with a penalty. But the auditor did not obtain any part of the money paid by appellant, nor did the county attorney, Mount, nor was the county attorney a public officer. The treasurer, Johnson, did not demand or exact the payment of the money. So

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far as he was concerned it was but a voluntary payment, and there is no charge that he made any claim to any part of it.

There was no error in the rulings complained of.

Judgment affirmed.

THE STATE v. WICKWIRE.

[No. 2,079. Filed November 24, 1896.]

INTOXICATING LIQUORS.—*Violation of Law.—Sufficiency of Affidavit.*

—An affidavit charging a violation of section 4 of the Act of March 11, 1895, which requires that any room where intoxicating liquors are sold shall be situated upon the ground floor or basement of the building and fronting on the street or highway, alleging that defendant was the proprietor of the room where the liquors were sold and that such room did not front on the street or highway, is sufficient without directly averring that defendant or his agents sold liquors in such room.

From the Elkhart Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, M. R. McClaskey and V. W. VanFleet, for State.

O. F. Chamberlain and P. L. Turner, for appellee.

LOTZ, C. J.—The State commenced this prosecution against the appellee for the violation of section 4 of the Act of March 11, 1895. Acts 1895, p. 248.

So much of this section as is applicable to this case is as follows: "Any room where intoxicating liquors are sold by virtue of a license issued under the laws of the State of Indiana, for the sale of spirituous, vinous, malt or other intoxicating liquors in less quantities than a quart at a time, with permission to drink the same upon the premises, shall be situated upon the ground floor or basement of the building where the

same are sold, and in a room fronting the street or highway upon which such building is situated; and said room shall be so arranged, either with window or glass door, as that the whole of said room may be in view from the street or highway; and no blinds, screens or obstructions to the view shall be arranged, erected or placed so as to prevent the entire view of said room from the street or highway upon which the same is situated during such days and hours when the sales of such liquors are prohibited by law."

The affidavit upon which this prosecution is based charges that the defendant "was then and there the proprietor of a room where intoxicating liquors were sold, by virtue of a license issued under the law of the State of Indiana to him for the sale of spirituous, vinous and malt liquors in less quantities than a quart at a time, with permission to drink the same upon the premises; and that said Frank Wickwire did then and there unlawfully maintain and keep said room in a place not fronting the street or highway upon which the building, where the said liquors were sold, was situated."

The trial court sustained appellee's motion to quash, and this ruling presents the error assigned.

The manifest purpose of the statute is to prevent the sale of intoxicating liquors during such times and hours as are prohibited by law; and as a means to this end the room or place where sold is required to be exposed to view from the street or highway.

The appellee insists that the charge is insufficient because it is not directly averred that either he or his agents sold any intoxicating liquors in the room or place. The gist of the offense consists in keeping or maintaining the room for the sale of such liquors when not fronting upon a street or highway, and this is directly averred.

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It is also averred that the appellee was the proprietor of the room where the liquors were sold.

Some other minor objections are made to the affidavit, but we think it sufficient.

Judgment reversed, with instructions to overrule the motion to quash.

THE STATE v. CONE.

[No. 2,087. Filed November 24, 1896.]

CRIMINAL LAW.—*Public Indecency.—Sufficiency of Affidavit.*—Under section 2081, Burns' R. S. 1894, providing that whoever being over fourteen years of age, uses or utters any obscene or licentious language or words in the presence of any female is guilty of public indecency, etc., if the language is not obscene or licentious *per se* it must be shown by extrinsic averments that it was used in an obscene or licentious sense and was so understood by the female.

From the Elkhart Circuit Court. *Affirmed.*

W. A. Ketcham, Attorney-General, M. R. McClaskey and V. W. VanFleet, for State.

J. S. Dodge and O. Z. Hubbell, for appellee.

DAVIS, J.—This is a prosecution under section 2081, Burns' R. S. 1894 (1895, R. S. 1881), for public indecency. The court below sustained the appellee's motion to quash the affidavit in the cause and discharge the defendant from custody, and the State then excepted. The State of Indiana brings this appeal to reverse said ruling.

The part of section 2081, under which this prosecution was brought, reads as follows: "Whoever, being over fourteen years of age, * * * uses or utters any obscene or licentious language or words in the presence or hearing of any female * * * is guilty

of public indecency," etc. The affidavit charges that "in the county of Elkhart, and State of Indiana, on the 7th day of October, 1895, Bert Cone was then and there a male person of over fourteen years of age, and that said Cone did then and there, in the presence of a female, Katie Marker, use and utter obscene and licentious language and words, such words being as follows: 'After my balls are over,' meaning by the word balls his testicles, and further crying out, 'is there anything in it,' meaning thereby to inquire if said Katie Marker was not a woman of bad character for chastity."

The language charged as having been used by appellee is not such as to convey a meaning in its nature obscene or licentious unless aided by extrinsic averments. It is charged, by way of inducement or colloquium, that the words were uttered by him in an obscene or licentious sense, but it is not charged that anyone in his presence or hearing so understood the words. The crime consists in uttering obscene or licentious language in the presence or hearing of a female. Where language that is obscene or licentious *per se*, is uttered in the presence or hearing of a female the crime is complete, but where the language is not obscene or licentious *per se*, the use of it is not a crime unless it is shown by extrinsic averments that it was used in the presence or hearing of a female in an obscene or licentious sense, and that she so understood the words. The words charged in the affidavit might be used in such connection with other words or with acts to which an obscene or licentious meaning might attach, but nothing is averred showing how or in what connection the words were uttered, or that they had any local or provincial meaning.

Assuming, therefore, that the words set out in the affidavit can be made actionable by the use of extrinsic

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language, the extrinsic language used in this instance is not, in our opinion, sufficient to charge the crime. *State v. Coffing*, 3 Ind. App. 304.

The appeal is not sustained.

Judgment affirmed.

ANGLEMYER v. BLACKBURN.

[No. 2,280. Filed November 24, 1896.]

HARMLESS ERROR.—*Pleading.*—*Counterclaim Containing Same Matters Pleaded in Answer.*—Where a defendant recovers on a counterclaim an amount in excess of plaintiff's demand, the overruling of a demurrer to an answer setting up as a defense the same matters pleaded as a counterclaim, if erroneous, is harmless error.

PLEADING.—*Counterclaim.*—A counterclaim that discloses a right to recover on any of the items declared upon therein is not demurrable.

VENUE.—*Application for Change, After Time Fixed by Rule of Trial Court.*—It is not error for the trial court to refuse a change of venue when the application is made after the time fixed by a rule of the court.

From the Miami Circuit Court. *Affirmed.*

Isaiah Conner, Julius Rowley and W. W. McMahan,
for appellant.

Nott N. Antrim, Robert J. Loveland and H. P. Loveland,
for appellee.

REINHARD, J.—The appellant has assigned as errors:

1. The overruling of his demurrer to the fifth paragraph of appellee's answer.

2. The overruling of the demurrer to the appellee's counterclaim, numbered paragraphs 6 and 7, and in each of said rulings.

3. The overruling of appellant's motion for a *venire de novo*.

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4. The overruling of the appellant's motion for a new trial.

The appellant instituted this action to recover of appellee an alleged indebtedness of \$250.00. The complaint alleges "that on the 7th day of September, 1893, the said parties made an exchange of certain real estate, situate in the counties of Miami and Fulton, in the State of Indiana, and conveyed the same by deed to each other. In making said exchange of real estate, as aforesaid, there was a difference in the value thereof, in favor of the plaintiff, in the sum of \$250.00, which said defendant then and there promised and agreed to pay the plaintiff; but plaintiff says said defendant has not paid said sum, nor any part thereof, but that the same, with interest thereon, at six per cent. per annum, is due, but remains wholly unpaid, for which, and all proper relief, plaintiff demands judgment."

In the fifth paragraph of the appellee's answer it is averred that the defendant "admits that on the 7th day of September, 1893, he promised and agreed to pay to said plaintiff the sum of \$250.00, as a difference then and there supposed to be due plaintiff upon the exchange of real estate, as alleged in plaintiff's complaint. But defendant says that the consideration for said promise and agreement failed in this, to-wit: that a part of the consideration given defendant for this conveyance to plaintiff of the real estate in Fulton county, referred to in his complaint, and defendant's promise to pay said \$250.00, consisted of a lot of lumber situated in a mill yard near the town of Gilead. The undivided half of which mill yard was sold and conveyed by the plaintiff to said defendant, in exchange, in part payment for said Fulton county real estate, which lumber was of the value of \$30.03; that a further part of the consideration given to said de-

fendant for his said conveyance to plaintiff, of the real estate in Fulton county, referred to in his complaint, and defendant's promise to pay plaintiff said \$250.00, consisted of a lot, to-wit, 39,822 feet of timber, of the value of \$323.00; that the plaintiff had not at the time of said agreement, and has not since, any title to said lumber or timber, and has at no time conveyed to said defendant any title thereto, or given him possession thereof, or any part of the same."

There is no averment, either in the complaint or in the answer above set forth, which shows the respective amounts at which the real estate of either party was estimated. The complaint and the answer demurred to, when construed together, disclose the following facts: Appellant conveyed to appellee certain real estate in Miami county, together with certain lumber of the value of \$30.03, and certain timber of the value of \$323. In consideration of this the appellee conveyed to appellant certain real estate in Fulton county and promised to pay the appellant the sum of \$250.00, which he has failed to pay, and for which appellant brings this action. Appellant has failed to deliver the lumber and timber and has no title to the same.

The appellant earnestly insists that this answer is fatally defective in that it attempts to answer the entire complaint when in fact it answers only a part. Whether this pleading is subject to the objections urged or to others that might be named we need not determine. The same matters set forth in the fifth paragraph of the answer are also pleaded as a counterclaim. The verdict of the jury shows that they found for the defendant on his counterclaim, assessing the damages at \$300.00. This amount is sufficient to counterbalance any sum that might have been found due the appellant on his cause of action.

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Disregarding this answer, therefore, nothing could possibly be due the appellant on his complaint in any event. Consequently, if the ruling upon the demurrer to the answer in question was erroneous, the error was harmless, and cannot result in a reversal of the judgment.

It is next insisted that the court erred in overruling the demurrer to the counterclaim. The counterclaim proceeds upon the theory of a warranty of title and a breach of said warranty by reason of a failure of title. It is urged that the pleading is bad because it alleges no value of the real estate conveyed to the appellee. It is alleged, however, that the lumber and timber which the appellant agreed to deliver to the appellee were of the value of \$30.03 and \$323.00, respectively, and that the appellant failed to deliver the same, or any part thereof, having no title to the same. We fail to perceive the necessity for averring the value of the real estate. If the parties made a contract, as alleged, by virtue of which the appellant agreed to deliver certain lumber and timber of a certain value, and he failed to do so, the appellee was damaged the value of such lumber and timber, regardless of the value of the land conveyed. The appellee had the right to stand upon the terms of the contract. If the land he received was worth more than enough to counterbalance any loss in the lumber and timber, this would not give the appellee the right to recoup the excess in the value of the land as against the deficit arising upon the lumber or timber transaction. According to the averments of the counterclaim, the appellant agreed to deliver to the appellee the lumber and timber mentioned, and if he failed to do so, the appellee had the undoubted right to recover of him the value of the same. If in the exchange the appellee received the best end of the bargain, we can

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not help the appellant. It was his own contract, and the law will compel him to live up to it, in the absence of any fraud or mistake.

Another objection urged to the counterclaim is that any warranty of title of the real estate could be evidenced only by the deed of conveyance executed, and that the deed should have been made an exhibit. We do not think the pleading bad even if it be conceded that any warranty pertaining to the land must be contained in the deed, and in an action for such breach the deed must be made an exhibit. Granting that appellant can recover nothing on account of the warranty of title of the land, he can still recover for the failure to deliver the timber and lumber.

What we have just said applies also to the other paragraph of the counterclaim. It is averred in this pleading that appellant in the exchange of real estate agreed to deliver to appellee certain logs to which he had no title and did not deliver to him, and that he was damaged in a certain amount. It is true that there is a further averment as to a certain mill and other property which appellant agreed to convey and turn over to appellee, and of its conditions as warranted and as it actually was; but without regard to any other property than the logs we think a valid cause of action is shown in the appellant's failure to deliver the logs, and this is sufficient. If the complaint, or, in this case, the counterclaim discloses a right to recover on any of the items declared upon, the demurrer must be overruled, although as to other items the pleading may be defective. If the appellee is entitled to some relief, the counterclaim is sufficient, although not entitled to all the relief demanded. *Levi v. Hare*, 8 Ind. App. 571.

The appellant was not entitled to a *venire de novo*. The verdict was not defective. The fact that the jury

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in one portion of the verdict found for the appellee as to the attachment proceedings and in the other found for the appellee on his counterclaim does not render the verdict so uncertain that a judgment could not be rendered upon it. The verdict is sufficiently plain to be understood. 1 Works Pl. and Prac., section 970; Thornton, Juries, section 273.

It is finally contended that the court erred in overruling appellant's motion for a change of venue. A rule of the trial court, certified to this court, requires such applications to be made before issues are formed. To have granted the change would have been a violation of this rule.

The certification of the rule to this court was properly made. *Rout v. Ninde*, 111 Ind. 597.

The court had power to make such rule. *Redman v. State*, 28 Ind. 205; *Ringgenberg v. Hartman*, 102 Ind. 537; *Jones v. Dipert*, 123 Ind. 594.

The application was properly refused.

Judgment affirmed.

THE STATE v. HARDMAN.

[No. 2,282. Filed November 24, 1896.]

STATUTES.—Reenactment.—An amendatory statute which simply defines the same offense in substantially the same language as that used in the statute amended does not take away the right of prosecution under the amended statute for an offense committed before the act as amended became effective.

SAME.—Saving Clause.—The provisions of section 248, Burns' R. S. 1894, that the repeal of a statute shall not have the effect to repeal or extinguish any penalty, forfeiture, or liability incurred thereunder, are by law imported into the subsequent repealing acts and obviate the necessity for individual saving clauses.

SAME.—Repealing Acts.—Statute Construed.—Penalty.—The provision of section 248, Burns' R. S. 1894, that "the repeal of a statute shall

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not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide," applies to penal statutes imposing punishment by imprisonment, and the word "penalty" is not restricted to a pecuniary liability.

From the Grant Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, and *Elias Bundy*, for State.

H. M. Elliott, *G. M. Elliott*, *J. T. Strange* and *E. A. Huffman*, for appellee.

GAVIN, J.—On June 16, 1895, the following statute was in force in this State: "Whoever makes, composes, dictates, prints, or writes a libel to be published, * * * and whoever publishes or knowingly aids in publishing or communicating a libel, is guilty of libel, and shall, upon conviction thereof, be fined not more than one thousand dollars nor less than five dollars, to which may be added imprisonment in the county jail for not more than one year nor less than ten days." Section 1998, Burns' R. S. 1894. On July 1, 1895, the Act of 1895 concerning libel went into force. Acts 1895, p. 91; section 1925, Horner's R. S. 1896. Section 3 of this act contains all that is comprised in the first quoted section save that the imprisonment is limited to six months. In addition thereto it contains some additional specifications as to who may be punished for libel, and also prescribes certain rules of evidence to govern upon the trial. In the following section is a clause repealing all laws in conflict therewith without any saving clause.

It has been decided that an amendatory statute which simply defines the same offense in substantially the same language as that used in the statute amended does not take away the right of prosecution under the amended statute, but the new statute is to

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be regarded as a continuation of the old. *Sage v. State*, 127 Ind. 15.

It is claimed, however, by appellee that the latter act without being amendatory of the former, or a reenactment of it, covers the same subject matter and also creates new and distinct offenses, prescribing different penalties therefor and thereby repeals the said section 1998. *Wright, Aud., v. Board, etc.*, 98 Ind. 88; *State v. Mason*, 108 Ind. 48; *State v. Wells*, 112 Ind. 237.

Assuming this to be the case the question presented for our determination is: Does the repeal of the first named act carry down with it the right to prosecute for violations of its provisions occurring before the repeal? It has been adjudged by our Supreme Court that no one can after its repeal be convicted for the violation of a repealed statute unless the repealing act made provision therefor by a saving clause. *Taylor v. State*, 7 Blackf. 93; *State v. Loyd*, 2 Ind. 659; *Whitehurst v. State*, 43 Ind. 473; *State v. Mason, supra*.

In 1877 a law was passed providing that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Section 248, Burns' R. S. 1894 (248, Horner's R. S. 1896).

Both the Supreme and this court have already held that this statute preserves liabilities which would otherwise fall by reason of the repeal of the statute upon which they are founded. *Daggy, Tr., v. Ball*, 7 Ind. App. 64; *Crawford, Tr., v. Hedrick*, 9 Ind. App. 356; *Bruce, Treas., v. Cook*, 136 Ind. 214.

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The language of section 248 is broad enough to apply to criminal liabilities and the penalties incurred by reason of a disregard of the penal statutes of our State.

It is true that the word "penalty" is frequently used to designate a pecuniary punishment or liability, and has sometimes even been declared to be limited to that class alone and not to include imprisonment. *Village of Lancaster v. Richardson*, 4 Lans. 136.

We are satisfied, however, that the word is susceptible of, and is frequently used in a broader sense than this, and as a generic term including both pecuniary and personal punishment, and that this is the meaning which should be ascribed to it as used in this statute. Penal laws are defined to be "those laws which prohibit an act and impose a penalty for the commission of it. They are of three kinds: *poena pecuniaria*, *poena corporalis*, and *poena exilii*," Rapalje and Lawrence Law Dict., p. 945. Thus, if we may translate freely, three kinds of penalties are recognized which affect the pocketbook, the person, or the political status of the individual.

The Imperial Dictionary defines "penalty" as "the suffering in person or property which is annexed by law to the commission of a crime, offense or trespass as a punishment." To the same effect are the Encyclopaedic Dictionary, and the Century.

Bouvier says it is "the punishment inflicted by a law for its violation. The term is mostly applied to a pecuniary punishment."

Black says it is "A punishment; a punishment imposed by statute as a consequence of the commission of a certain specified offense."

Counsel for appellee in their brief filed in this cause, themselves use the word in this more general sense. The Supreme Court so use it in the case cited by them,

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State v. Wells, supra, saying: "The general rule is that where a new statute covers the whole subject matter of an old one, adds new offenses and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication.'"

General saving statutes such as this are by law imported into the subsequent repealing acts and obviate the necessity for individual saving clauses. *Commonwealth v. Sherman*, 85 Ky. 686; *State v. Kansas City, etc., R. R. Co.*, 32 Fed. 722.

All the cases cited by appellee, holding that the right of prosecution is lost by the repeal without a saving clause, arose prior to the enactment of the law of 1877, save *State v. Mason* alone, which was decided afterwards.

In that case, however, the effect of this statute was not considered, nor is any reference to it made therein. It cannot, therefore, be regarded as determinative of such effect.

That this decision was inadvertently rendered is recognized by the same court in the later case of *State v. Wells, supra*, where its authority upon the point now before us was expressly disclaimed, and where the applicability of said section 248 to prosecutions, such as this, is conceded.

Our conclusion, therefore, is that the right of prosecution was not lost by the repeal of the law under which the offense was committed, but the same was continued by said section 248.

Appellee urges the insufficiency of the information upon the ground that it only charges the offense in the language of the statute which did not define the offense. It is sufficient to reply to this that counsel are evidently mistaken as to the fact. The information as set out in the record avers the facts constituting the libel fully and in detail, setting out the libelous mat-

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ter with great particularity. That the malicious publication of the matters therein averred, if false, as declared, was libelous *per se*, is not, in our opinion, open to question.

No specific averments were necessary to make it appear that it was published of and concerning William L. Paulus, and that if the publication tended to degrade him, expose him to public hatred and ridicule, or deprive him of the benefits of public confidence, etc. The article spoke for itself and made the charges directly against William L. Paulus by name, and they were of such a character as necessarily tended to disgrace him and expose him to public hatred, ridicule and distrust.

Judgment reversed.

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[No. 2,284. Filed November 24, 1896.]

SALES.—Breach of Contract.—Measure of Damages.—In an action by the seller against the purchaser of personal property for a breach of the contract, where the title to the property had never passed to the purchaser, the measure of damages is the difference between the price fixed by the contract and the market value of the property at the time and place of delivery.

SAME.—Pleading.—Complaint.—Breach of Contract.—R entered into a contract with M by which R agreed to furnish M 500 cords of bark on or before November 1, 1893, the price to be governed by the ruling price in Cincinnati in the spring months of 1893, and such additional sum as it would require to deliver the bark to Columbus, Ind., over and above what it would cost to deliver the bark to Cincinnati. R prepared for market the 500 cords of bark, and at the time for delivery notified M that he was ready to ship the same; whereupon M repudiated the contract. *Held*, that R's complaint declaring upon a breach of the contract, averring that R, after the breach, sold the bark for the best price attainable, which was a specified sum less than he would have realized but for the breach, but does not allege the market value at Columbus when the

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default was made, or the expense of shipment and sale, is not sufficient to withstand a demurrer.

SAME.—*Breach of Contract by Purchaser.—Seller's Remedy.—Notice.*—The seller, in an executed sale not accompanied by delivery, has his choice of two remedies. He may retain the property for the benefit of the purchaser, and subject to his orders, and sue for the entire purchase price; or he may resell the goods and recover from the purchaser the difference between the contract price and the price of sale. But if the latter course be pursued, the seller, except under peculiar circumstances, for example, where the goods are of a perishable nature, is required to give the purchaser a preliminary notice of the time and place of resale.

From the Bartholomew Circuit Court. *Affirmed.*

E. S. Doolittle, Marshall Hacker and Chas. F. Remy,
for appellant.

Simson Stansifer and Chas. S. Baker, for appellees.

REINHARD, J.—The only error complained of in this case is the alleged error of sustaining the demurrer to the appellant's amended complaint. The complaint alleges, in substance, that on the 26th day of October, 1892, the plaintiff and defendants entered into a written agreement, a copy of which is filed with the complaint, by the terms of which the plaintiff was to furnish the defendants with 500 cords of 128 cubic feet, or 2,400 pounds each, of prime chestnut bark, to be peeled during the spring of 1893, and straightly and solidly loaded in cars and consigned and delivered to defendants at Columbus, Indiana, on or before November 1, 1893. In consideration thereof the defendants were to pay the same price as the ruling price in Cincinnati, in the spring months of 1893, together with such additional sum as it would require to deliver the same in Columbus, Indiana, over and above what it would require to deliver it in the city of Cincinnati, Ohio; that, confiding in the undertakings of the defendant, as set forth in said agreement, the plaintiff,

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in the spring of 1893, in the State of West Virginia, did peel and prepare for market 500 cords of chestnut oak bark of the quality, weight and measurement called for in said agreement; that in preparing said bark for market, as aforesaid, he expended a large sum of money, to-wit, \$1,000.00; that in the city of Cincinnati, in the State of Ohio, in the spring of 1893, the ruling price of prime chestnut oak bark, of the quality, weight and measurement called for in said agreement and of the kind and quality that had been peeled and prepared for market by the plaintiff, as aforesaid, was \$13.00 a cord; that thereafter, and long before the 1st day of November, 1893, the plaintiff had the 500 cords of bark ready for shipment to the defendants, and was ready and willing, and offered to ship and deliver the said bark to the defendants, in accordance with the terms of said agreement; and the defendants having full knowledge of all the facts, and of the plaintiff's offer and readiness to deliver said bark to the defendants, the latter notified plaintiff in writing, that they had no contract with plaintiff for any bark and would not receive any bark that plaintiff would ship or deliver them; and that defendants did not then and there, nor at any time, accept and receive said bark in accordance with the terms of the said contract; that owing to the said absolute refusal to accept said bark, the plaintiff was obliged to resell the same, and, thereafter, on the 1st day of August, 1893, did resell said 500 cords of bark, so remaining in his possession unaccepted and unpaid for as aforesaid, at and for certain sums of money, amounting in the whole to a much less sum of money, to-wit, the sum of \$2,500.00 less than the amount of said sum of money so offered and agreed upon by the defendants for the same, and there was thereby a deficiency upon such resale of \$2,500.00, over and besides the charges

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attending such resale, amounting to a certain other sum of money, to-wit, \$500.00, making in all \$3,000.00; that in reselling said bark the plaintiff sold to realize as far as possible the unpaid purchase money due him for such bark from the defendants, and that he sold the same within a reasonable time and exercised due diligence, and by good faith tried to realize the best price he could for said bark, and did realize the best attainable price therefor at said time. Wherefore, etc.

The contract, a copy of which is filed with the complaint, is as follows:

"Agreement, made this 26th day of October, 1892, between J. F. Ridgley, of Milton, West Virginia, and W. W. Mooney & Sons, of Columbus, Indiana, witnesseth: That said J. F. Ridgley agrees to furnish said W. W. Mooney & Sons with 500 cords of 128 cubic feet, or 2,400 pounds each, of prime chestnut oak bark, peeled during the spring of 1893, and to be delivered on or before the 1st day of November, 1893, at Columbus, Indiana. Said bark to be straightly and solidly loaded in cars and consigned direct to W. W. Mooney & Sons, Columbus, Indiana. In consideration whereof, said W. W. Mooney & Sons agree to pay said J. F. Ridgley the same price as ruling in Cincinnati in the spring months of 1893, and the additional sum that it would require to deliver said bark in Columbus, Indiana, over and above what it would require to deliver same in Cincinnati, Ohio.

"It is further agreed that Mr. Ridgley can increase this contract to one thousand cords instead of five hundred, by giving the said W. W. Mooney & Sons due notice of this in writing prior to February 1, 1893.

"Signed in duplicate day and year above mentioned.

J. F. RIDGLEY.

W. W. MOONEY & SONS."

It is the evident theory of the complaint that for the alleged breach of the contract on the part of the appellees, the measure of damages is the difference between the contract price and the price for which the bark was actually sold by the appellant.

In *Dwiggins v. Clark*, 94 Ind. 49, the law governing such cases was declared as follows:

"In actions by the vendor based upon such contracts as this, the measure of damages arising out of the state of facts shown by the complaint, and, therefore, the nature of the cause of action, is controlled by the question whether upon the facts the title to the property is regarded as having passed to the buyer or as still remaining in the seller. In the former case the seller is entitled to recover the contract price; while in the latter case he may recover damages measured by the difference between the contract price and the market price at the time and place of delivery."

The rule as above stated was applied by this court in *Neal v. Shewalter*, 5 Ind. App. 147, and *Shipp's v. Atkinson*, 8 Ind. App. 505.

It is undoubtedly true that in many cases the vendor may, upon breach by the buyer, sell the property and recover the difference between the contract price and the selling price. This principle, we think, is also contingent upon the question whether the title of the property has passed to the purchaser or still remains in the seller.

The contract declared upon was an executory one. By its terms the appellant agreed to prepare for the market for appellees, 500 cords of bark of a certain quality, and deliver the same, on or before a certain date, at Columbus, Indiana. The complaint alleges that the plaintiff duly prepared the bark and notified the defendants that he was ready to ship the same, but that the defendants refused to accept or receive it,

stating that they had no such contract with him as he claimed to have.

But although the contract was executory it may have become so far executed as that the title to the property had passed to the purchaser, though possession was still retained by the seller.

In every case, whether the title to the property has passed to the purchaser or still remains in the vendor, if there has been a breach by the buyer, by refusing to accept the property and pay for it, the vendor has his remedy in an action for damages. Where the title has not passed, of course the seller still has the goods, and hence he is not damaged to the full value of the same. He can only recover, in such a case, whatever may be the loss sustained by him on account of the purchaser's default. This loss, as the cases cited above declare, is the difference between the price fixed by the contract, and the market value of the goods at the time and place of delivery, as provided in the contract. For additional authorities on this point see *McComas v. Haas*, 107 Ind. 512; *Pittsburgh, etc., R. W. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Beard v. Sloan*, 38 Ind. 128. Where, as in the present case, the seller is, by the terms of the contract, required to ship to a certain place, and to receive, in addition to the contract price, the expense of shipment, doubtless the expense of getting the goods to the market and reselling the same should be added to the damages, for the object of the remedy given is to make the seller whole on account of the loss suffered by the default of the buyer.

In the case at bar, as we have seen, the contract price was the market value of the bark at Cincinnati, in the spring of 1893, "and the additional sum that it would require to deliver said bark in Columbus, Indiana, over and above what it would require to deliver same at Cincinnati, Ohio." It is alleged in the com-

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plaint that the market value of such bark in Cincinnati, during the spring months of 1893, was \$13 per ton. This amount, then, \$13.00 per ton, was the contract price. If we add to this the additional expense required to take the bark to market and sell it, and deduct from it its market price at Columbus, Indiana, at the time it should have been delivered there, which was not later than November 1, 1893, we obtain the measure of the damages to which the appellant is entitled for the alleged breach of contract, provided the title of the bark did not pass to the appellees. As the appellant had the option of delivering the bark at any time after it was ready for shipment, not later than November 1, 1893, it follows, we think, that he was entitled to fix the market price at the time he was ready and offered to ship to Columbus. If we assume (what is not alleged), that this was at or about the time he alleges he sold the bark, viz., August 1, 1893, the value of the bark in Columbus, Indiana, at or about that time, would be the proper criterion for the establishment of the market value of the property. There is no averment in the complaint as to the place where the appellant sold the bark and we are unable to see, therefore, how the price for which he sold could in any way establish the market value of the bark in Columbus, even if we assume that he sold it for its full value in the market to which he took it. For anything that is averred he may have sold it in Europe, or in West Virginia where it was prepared, and we cannot assume that bark of the quality for which the contract calls, was of the same value in every market of the world. The value must be the market value at the time and place of delivery, as we learn from the decisions of our own courts heretofore cited in this opinion, and as is held in the courts of other states. The market price of another place and at another time

would not be material, unless it tended to prove the value at that time and place. "A reasonable range of time is sometimes allowed in which to average the price, so that sudden, unnatural, and spasmodic values, not indicating the real state of the market, may not prevail." 21 Am. and Eng. Ency. of Law, 579.

We do not wish to be understood as holding that appellant was bound to take the bark to Columbus, if he could have found a better market elsewhere, either at home or abroad. But in the latter event he should have averred this fact in direct terms and shown by the facts set out that he obtained for it the best market price.

From what we have said follows the inevitable conclusion, we think, that, if the facts alleged make a case in which the title to the property had not passed to the purchaser at the time of the breach, the complaint is fatally defective in failing to show the market value of the property when the default was made, and the expense of shipment and sale, as elements essential to the measurement of the damages to which the appellant would be entitled.

Appellant's counsel concede that the title to the bark never passed to the purchaser. This concession was possibly necessitated by the fact that, under the averments, the appellant must be held to have treated the property as his own when he sold it, not as the agent of the vendee and for his account, but in the exercise of such acts of ownership over it as would conclusively indicate that he regarded himself still as the owner. The concession, whatever may have prompted or induced it, is fatal to the appellant's right of recovery, for, as we have shown, the appellant has wholly failed to aver such facts as would enable

the court or jury to determine what damages he has sustained.

If, however, we should disregard the concession of the appellant that the title to the bark had not passed to the appellees when they made default, and if it could be said from the averments of the complaint that the appellant treated the property as belonging to the appellees and that he sold it as their agent and for their account, it would still remain to be determined whether the appellant has pursued a course that will entitle him to recover in the present action.

In such a case he would have the choice of one of two remedies: He could retain the property for the benefit of the appellees, and subject to their orders and sue them for the entire purchase price; or he could sell the goods as he did and recover from the appellees the difference between the contract price and the price of the sale. *Pittsburg, etc., R. R. Co. v. Heck, supra*; Benj. Sales (Corbin's Am. Ed. 1889), section 1165, and authorities cited in note 3. If, however, he chooses to pursue the latter course, he must manifest his election to do so, by a preliminary notice that he intends to sell and hold the purchaser for the loss.

The case of *Redmond v. Smock*, 28 Ind. 365, is decisive of the point in our own State. There the plaintiff had sold to the defendants a stock of goods, together with an unexpired lease on a storeroom in which they were situated, for which payment was to be made in the future. The breach assigned was that the defendants refused to make the payments and that they had abandoned the lease, storeroom and goods, and repudiated the contract. The action was for damages for the loss of the profit of the sale of the lease, the decline in the value of the goods, and expenses incurred in making a resale, etc. The Supreme Court held that the taking possession of the goods by the

plaintiffs and treating them as their own and selling them in their own names amounted to a rescission of the contract, and then said:

"If the plaintiffs had, upon the refusal of the defendants to receive and pay for the goods, given them notice that they, the plaintiffs, should sell the goods for the plaintiff's account, and hold them responsible for any deficiency on the resale, and for the expenses of keeping and reselling the articles, the plaintiffs would, perhaps, have been authorized to sell the goods in the usual way of disposing of such property, but in the absence of any notice whatever of any such intention, the subsequent sale by the plaintiffs was a rescission of the contract."

In this class of cases the seller has a lien on the goods for the purchase money which he may enforce by a resale. The object of the notice of the intention to sell seems to be to hold the purchaser for the deficiency. The notice must be a reasonable one, and what is a reasonable notice depends upon the circumstances of each particular case. See 21 Am. and Eng. Ency. of Law, 597, note 1.

In *Holland v. Rea*, 48 Mich. 218, 223, 12 N. W. 167, it is said that "it is now generally assumed that where the agreement is silent in regard to it and no special incidents appear to contend for it and where the extent of the vendee's liability is not to be unalterably decided by the price obtained, no notice of the resale itself is necessary. On the other hand it is held by high authority that to entitle the vendor to proceed by resale instead of rescission or by action for the whole agreed price or actual consideration, he must manifest his election by preliminary notice that he intends to sell and hold the vendee for the loss, or notice to that effect." Whatever relaxation of the rule may have been made by the decisions of the

courts, we feel bound by the holding in our State that in such a case a preliminary notice is required. Mr. Sutherland, in his valuable work on the law of damages, states the rule to be that the vendor in such a case as this may resell the property within a reasonable time after notice to the vendee of his intention to resell, the resale being made on the theory that the property is that of the vendee retained by the vendor as a means of realizing the contract price, the seller acting as the agent of the vendee, and that after the giving of the notice of the vendor's intention to sell, no notice of the time and place of the resale is necessary to be given, but that it must be made according to the usage of trade. Sutherland on Dam., 2 Rev. Ed. 1893, section 647. He cites a large number of cases in support of the rule requiring notice, although he says in the same connection that there are some authorities to the effect that if the buyer has notice of the facts which give the vendor the right to resell and the former absolutely refuses to comply with his contract, no notice of an intention to resell is necessary. The only authorities he cites in favor of this view are *Waples & Co. v. Overaker & Co.*, 77 Tex. 7, 13 S. W. 527; *Ullman v. Kent*, 60 Ill. 271. There are doubtless other cases which he might have cited in support of it, but we think the weight of authority is on the side of the doctrine that, except under peculiar circumstances, for example, where the goods are of a perishable nature, the seller is required to give a preliminary notice of his intention to resell.

In Kerr's Benjamin on Sales the law is thus stated:

"It is the duty of the seller to give notice to the buyer of his intention to make the resale. But it is not essential that he should notify the buyer of the time and place of sale." 2 Benj. on Sales (1888), p. 780, note to section 1077.

Tiffany on Sales (1895), section 122, says: "Notice of intention to exercise the right of sale should be given, though cases may arise where, owing to the perishable character of the goods, or other circumstances, notice might be dispensed with. Notice of the time and place of sale, however, is not essential," citing, among other cases, *Redmond v. Smock, supra*.

Chalmers on Sales, section 48, states the law as follows: "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

Whatever may be the true theory of the complaint, therefore, in the present case, as to whether the title to the bark had passed to the appellees or was still in the appellant when the alleged breach occurred, the facts alleged do not state a valid cause of action. If the title remained in the appellant, he could have sued for and recovered the difference between the contract price and the market value of the bark, at the time and place of the sale. If he elected to treat the property as that of the appellees, he could have retained it for their use and sued for the entire purchase price, or he could have resold the property as the agent of the appellees, having first given them notice of his intention to do so. As the appellant has failed to bring himself within the lines of either of these remedies, the complaint does not state a good cause of action, and the court below did not err in sustaining the demurrer.

Judgment affirmed.

THE J. F. SEIBERLING & CO. v. NEWLON.

[No. 1,578. Filed March 4, 1896. Rehearing denied Nov. 24, 1896.]

HARMLESS ERROR.—Overruling a demurrer to a bad paragraph of answer is harmless error where plaintiff's liability was determined by the findings of the court expressly made under the other paragraphs thereof.

SALES.—*Warranty.*—*Waiver of Notice.*—Where a manufacturer, through a local agent sold a harvesting machine, warranting same to do good work, such warranty containing the condition that if the machine did not do good work the purchaser to give immediate notice thereof in writing, both to the agent from whom he received the machine and to the manufacturer; the local agent was present at a trial of the machine at which it failed to work, and told the purchaser to try it again, and if it still failed to work to return it; such statement by the agent constituted a waiver of the written notice provided for in the warranty.

JUDGMENT.—*Special Finding.*—Failure to enter judgment on a special finding at the term of court the finding was made and filed, or any order continuing the cause, did not divest the court of jurisdiction thereof.

From the Washington Circuit Court. *Affirmed.*

J. A. Bradley, Harvey Morris, J. C. Lawler and D. M. Alsbaugh, for appellant.

Milton B. Hottel and John A. Zaring, for appellee.

ROSS, J.—The appellant sued appellee to recover the purchase price of an Empire reaping machine sold by it to him and warranted to do good work. The contract of sale was reduced to writing and was the basis of appellant's action. To the complaint appellee filed an answer of several paragraphs, to each of which demurrers for want of facts were filed and overruled by the court, and exceptions reserved to such rulings. The appellant filed replies to the special answers and upon the issues thus joined, the cause was submitted

to the court for trial. At the request of the appellant the court made a special finding of facts with conclusions of law thereon. From a judgment rendered in favor of the defendant the plaintiff appeals.

The first, second, third and fourth specifications of error assigned relate to the rulings of the court below upon the demurrers to the appellee's answer. The second specification seeks to question the sufficiency of the third paragraph of the answer, but inasmuch as the court makes its findings expressly under the other paragraphs, the error in overruling the demurrer to the second paragraph, if we concede that paragraph to be bad, was harmless.

The second, fourth and fifth paragraphs are the same in substance as those recently held good in the case of *Seiberling & Co. v. Rodman*, 14 Ind. App. 460.

The material facts found by the court within the issues joined, are in substance as follows: That the appellant, a corporation engaged in the manufacture and sale of machinery, on the 30th day of May, 1893, through its local agent, John C. Grubb, resident in Washington county, Indiana, who had the "selling, adjusting, setting up and otherwise managing in the sale of" appellant's combined reaper and binder, known as the Empire machine, sold to the appellee one of its machines for which he agreed to pay \$120.00 on the 1st day of September, 1893, the contract of sale having been reduced to writing and duly signed by the parties. In the contract of sale the appellant warranted the machine to be well made, of good material and, if properly managed, to do good work. And it was provided that the appellee should use the machine one day in the harvest field, to give it a fair trial, he to see that it was properly managed, and if upon such trial it did not do good work, he was "to give written notice both to the agent from whom he re-

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ceived the machine and to J. F. Seiberling & Co., Akron, Ohio.," stating wherein it failed to do good work, and to allow appellant reasonable time to get to the machine and remedy the defect, if any, and if appellant then failed to make it do good work, appellant should either give him a new machine or refund the money paid, or in case he had given notes therefor, to cancel his notes. That the continued possession of the machine after trial was to be conclusive evidence that it filled the warranty. On the 23d day of June, 1893, the appellant delivered the machine to the appellee at Salem, and he took it to his farm and on the 26th day of June, in the presence of appellant's selling agent gave the machine a fair trial, and it failed to do good work (the court finding specifically wherein it failed to do good work); and that appellant's agent tried to remedy the defects and to make the machine work properly and do good work, but that he failed to succeed. That said agent, seeing the imperfect work the machine was doing, urged appellee to continue the trial "alleging that as the paint wore off, and if freely oiled, the machine would work all right." That appellee complied with the request and continued the trial on the three succeeding days, during a part of which time appellant's agent was present, but the machine still continued to do bad and unsatisfactory work; that said agent again undertook to remedy the defect but failed, and then told appellee to give it another trial and if it did not do better work, for him to return it. That appellee gave it another trial and it failing to do good work, on the 5th day of July, 1893, he "duly mailed a notice in writing to plaintiff [appellant] at Akron, Ohio, stating therein that the machine in controversy did not do the work as it was warranted to do and that it was worthless and proposing to return it; and on same day handed to

said Grubbs [appellant's agent] a written notice of similar import, and at same time" proposed to return the machine which he did on the following day, returning it to the place where he had received it. On the 8th day of July the appellant answered the notice sent to it by appellee saying that it "claimed the right of reasonable notice," and that it could and would put the machine in good order and make it do good work, and on the 11th day of July appellant's general agent, Mr. E. E. Bollyard called upon appellee and asked him to take the machine back to his farm and give it further trial, but he refused. The court further finds that the machine was so badly made that it could not be made to do good work without remodeling and reconstruction. There is also a finding of a demand by appellant and a refusal by appellee of payment of the purchase price.

That the warranty relied upon by appellee was made conditional and dependent upon the compliance on his part, with certain things to be performed by him was decided in the case of *Seiberling & Co. v. Rodman, supra*.

The object of the stipulation requiring notice to be given in writing, both to the selling agent and the company was evidently for the purpose of making sure that an opportunity should be had to remedy any defects which might be found in the workings of the machine. The appellant could waive the giving of the notice, or if it was cognizant of the fact that the machine was not working and it had the opportunity and made an effort to remedy the defect, the necessity for the notice would be removed. *The Ohio Thresher and Engine Co. v. Hensel*, 9 Ind. App. 328. The court found that the appellant's selling agent was not only present at the time the machine was tried and knew that it did not do good work, but that he tried to rem-

edy the defect and failing to do so told the appellee to give it another trial and if it did not work, to return it to the place where he received it. So far as the facts found by the court disclose, the appellant's agent was the person to look after and see that the machine worked properly, and if it did not do so, to remedy the defect; and if he failed to do so that appellee had a right to return the machine and demand that his money be refunded. The court found that he was the appellant's agent for the purpose of "selling, adjusting, setting up and otherwise managing in the sale" of its machines. If his powers were not as broad as the court finds they were, appellant surely failed to prove the extent of his authority. He, at least, assumed to have authority, not only to make the machine work properly, but to determine whether or not it fulfilled the terms of the warranty. That he did direct what appellee should do with the machine in the event it did not do good work at the last trial, is found by the court, namely that he should return it to the place where it was received by him. But counsel for appellant say that the agent, Grubbs, had no right to waive the giving of the written notice specified in the contract of sale; that his powers as agent were limited, and that his knowledge of the fact that the machine did not do good work, and his efforts to make it do so, were not binding upon appellant. The finding by the court that he was appellant's agent for the purpose of selling, adjusting and setting up its machines, impliedly carried with it power to do all that was necessary in consummating the sale or in making the machine do the work it was warranted to do. In fact the sale was a conditional one in that, if the machine could not be made to do good work, appellee was privileged to return it and appellant was to refund him his money, if the machine had been paid for,

or if notes given, to cancel them. We cannot look beyond the facts found, to determine the rights of the parties; and if we were to admit that the power of the agent, Grubbs, was limited, we must do so by looking elsewhere than to the facts found by the court. Upon the facts found, the conclusions of law made by the court are right. *Champion Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. 417.

In presenting the seventh, eighth and ninth specifications of error assigned, counsel say: "The questions these assignments of error are assigned to present, all grow out of the fact that no judgment was entered on the special finding at the term it was made and filed."

The mere fact, as shown by the record, that the cause passed over from term to term without a judgment having been rendered on the finding, or any order of the court continuing the cause, did not divest the court of jurisdiction, either of the subject-matter of the action, or of the person of the parties. There is no merit in this contention.

We are not called upon, by reason of the condition of the record, to consider and pass upon some of the questions urged on behalf of the appellant, and which, if the facts in the record made them to appear as counsel insist, would in all probability compel a different result from the one we have reached. But our decision is based upon the record as it comes to us, and not upon questions which are not disclosed or properly presented by the record.

We find no reversible error in the record.

Judgment affirmed.

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[No. 1,924. Filed May 26, 1896. Rehearing denied Dec. 1, 1896.]

GUARANTY.—*Notice of Acceptance.*—A bond executed by an employe conditioned that he pay over to his employer all sums of money received by him as such employe, signed by his guarantors or sureties and delivered by him to his employer as a part of the consummation of the contract, is an absolute continuing undertaking on the part of sureties or guarantors, and no notice of the acceptance thereof by the guarantee was necessary.

APPEAL AND ERROR.—*Joint Assignment of Error.*—*Failure to Argue Error Assigned.*—An assignment of error made jointly to the ruling of the court in sustaining a demurrer to two paragraphs of a pleading is insufficient if either of them is good, and where such ruling as to one of the paragraphs is not attacked in the appellant's argument, such failure to argue will constitute a waiver as to both paragraphs.

From the Clinton Circuit Court. *Affirmed.*

E. C. Snyder, T. H. Ristine, B. T. Ristine, Paul & Bruner, and Kennedy & Kennedy, for appellants.

C. L. Holstein, C. E. Barrett and Bayless & Guenther, for appellee.

DAVIS, C. J.—This is a suit on an employe's bond conditioned for the faithful performance of his duty as a traveling and collecting salesman.

The principal in the bond, Ed. C. Scott, absconded, and was not served with process. The appellants, his sureties, defended.

The first paragraph of the complaint was dismissed by the plaintiff, and the case was tried on the second and third paragraphs of the complaint, which are in the words and figures following, to-wit:

"Second Paragraph. The plaintiff, by leave of the

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court, further complains of the defendants, and for second paragraph of complaint alleges: That said plaintiff, then and there being engaged in the wholesale grocery business, at the city of Indianapolis, Indiana, on the 4th day of April, 1892, it was mutually agreed by and between the plaintiff and the said defendant, Ed. C. Scott, that he, the said Ed. C. Scott, should be employed by him, the said plaintiff, as a commercial traveler and salesman in his said business, and that said defendant, Ed. C. Scott, should, as such employe, solicit orders, make sales of, and collections for goods, wares and merchandise, handled and sold by said plaintiff in his said business as such wholesale grocer, and that said Ed. C. Scott should faithfully perform the duties of his said employment and faithfully and truthfully report all his transactions as such employe, and faithfully account for and pay over to the plaintiff all moneys and notes received by him for plaintiff's use, as such employe, in consideration of payment of forty per cent. of the gross profits of sales made by him as such employe, less his expense and forty per cent. of his losses, which consideration and compensation the said plaintiff then and there agreed to pay the said Ed. C. Scott for his services as such employe.

"And in consideration of said contract, and as a part thereof, the said defendants, Ed. C. Scott, Samuel C. Scott, James R. Bryant and David W. Hughes, on said 4th day of April, 1892, executed to the said plaintiff their certain bond and writing obligatory, a copy of which is filed herewith and made a part hereof, marked Exhibit 'A,' in the sum of twenty-five hundred dollars (\$2,500.00), conditioned that the said Ed. C. Scott would faithfully perform the duties of his said employment and faithfully and truthfully report all his transactions as such employe, and faithfully

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account for and pay over to the plaintiff all moneys and notes received by him for the plaintiff's use; that the plaintiff then and there and thereupon, in consideration of the premises, that is to say, of the said contract and bond, employed the said defendant, Ed. C. Scott, as such commercial traveler and salesman, as aforesaid, and said defendant, Ed. C. Scott, then and there entered upon his duties as such employe and so continued in said employment until the 19th day of December, 1892, as the said defendants then and there and at all times well knew; that between the 5th day of April, 1892, and the 19th day of December, 1892, the said defendant, Ed. C. Scott, as such commercial traveler and salesman and employe, received money to the value and aggregate sum of \$3,500.00, to the use of the plaintiff, for which he has failed and refused to account to the plaintiff, and has converted the same to his own use, to the plaintiff's damage in the sum of \$3,500.00, which is due and unpaid. Of which default said defendants had due notice, and payment of said bond was demanded of them, but said payment was refused by them, and said bond is due and wholly unpaid. Wherefore plaintiff demands judgment for \$2,500.00, the penalty of said bond.

"Third Paragraph.—The plaintiff further complains of the defendant, and for third paragraph of complaint alleges: That the said plaintiff then and there being engaged in the wholesale grocery business at Indianapolis, Indiana, the said defendant, Ed. C. Scott, on the 21st day of March, 1892, applied to the plaintiff for employment as a commercial traveler and traveling salesman in his said business to solicit orders, make sales of, and collection for goods, wares and merchandise handled and sold by said plaintiff in his said business, and whereupon the said plaintiff

so employed the said defendant, Ed. C. Scott, upon the condition, and not otherwise, that he, the said Ed. C. Scott, would give and deliver to the plaintiff a bond in the sum of twenty-five hundred dollars (\$2,500.00), with approved sureties for the faithful discharge of his duties as such employe, and conditioned that the said Ed. C. Scott would faithfully perform the duties of his said employment, and faithfully and truthfully report all his transactions as such employe, and faithfully account for and pay over to the plaintiff all moneys and notes received by him for the plaintiff's use in said employment.

"And said plaintiff then and there agreed to pay said Ed. C. Scott, as compensation for his services as such employe, forty per cent. of the gross profits of the sales made by him, the said Ed. C. Scott, as such employe, less his expenses and forty per cent. of the losses made by him.

"And thereupon, on the — day of April, 1892, the said Ed. C. Scott executed and procured his co-defendants, Samuel C. Scott, James R. Bryant and David W. Hughes, to execute jointly with him to the plaintiff their certain bond and writing obligatory, a copy of which is filed herewith and made a part hereof, marked Exhibit 'A,' in the sum of twenty-five hundred dollars (\$2,500.00), conditioned that the said Ed. C. Scott would faithfully perform the duties of his said employment, and faithfully and truthfully report all his transactions as such employe, and faithfully account for and pay over to the plaintiff all moneys and notes received by him for plaintiff's use.

"And the said defendants having so, as aforesaid, executed said bond, they delivered the same to Ed. C. Scott for delivery by him, to the plaintiff, and the said Ed. C. Scott on the — day of April, 1892, delivered

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the same to the plaintiff, which said bond the plaintiff then and there approved and accepted, and said defendant thereupon entered upon his duties as such employe and so thereunder continued in said employment from the 5th day of April, 1892, until the 19th day of December, 1892, as said defendants then and there and at all times well knew.

"That between the 5th day of April, 1892, and the 19th day of December, 1892, the said defendant, Ed. C. Scott, as such commercial traveler, salesman and employe, received money to the value and aggregate sum of \$3,500.00 to the use of the plaintiff, for which he has failed and refused to account to the plaintiff, and has converted the same to his own use, to plaintiff's damage, in the sum of \$3,500.00, which is due and unpaid.

"That notice of said default was promptly given by plaintiff to said defendants, and payment of said bond demanded of them, but to pay the same or any part thereof they wholly failed and refused, and the same remains due and wholly unpaid. Wherefore plaintiff demands judgment for \$3,000.00."

The bond a copy of which was filed with the complaint and marked Exhibit "A," is as follows:

"Know all men by these presents, That Ed. C. Scott, of Montgomery county, in the State of Indiana, and Samuel C. Scott, J. R. Bryant and David W. Hughes, ——— county, State of Indiana, are hereby bound and by these presents do bind ourselves to George W. Stout, of Marion county, State of Indiana, in the penal sum of twenty-five hundred dollars (\$2,500.00). The conditions of this bond are that, whereas the said Ed. C. Scott has applied for and been given employment by the said George W. Stout to represent the said George W. Stout as commercial traveler, to solicit

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orders, make sales and collections for goods handled by said George W. Stout in connection with his business of wholesale grocer.

“Now, therefore, if the said Ed. C. Scott shall faithfully perform the duties of his said employment, and make a true and faithful report of all his transactions and pay over to the said George W. Stout all sums of money or notes by him received for his said employer, then this bond shall be null and void, otherwise be in full force and effect.

[Signed.]

ED. C. SCOTT,
SAMUEL C. SCOTT,
J. R. BRYANT,
DAVID W. HUGHES.

“STATE OF INDIANA, }
MONTGOMERY COUNTY. } ss.

Personally appeared before me, Samuel C. Scott, David W. Hughes, J. R. Bryant, and acknowledged the above signatures as their own.

S. E. VERIS, Notary Public.”

The demurrers of the defendants to this complaint were overruled.

The defendants, J. R. Bryant and David W. Hughes, filed a joint answer in four paragraphs.

The defendant, Samuel C. Scott, answered separately in two paragraphs, the first being a general denial, and the second a plea of “no consideration.”

The plaintiff’s demurrers to the first and second paragraphs of the joint answer of Bryant and Hughes were sustained.

The plaintiff then replied to the third and fourth paragraphs of said joint answer by a general denial, and a general denial was also filed to the second paragraph of Samuel C. Scott’s answer.

- Upon the issues so joined a trial was had by the
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court, without the intervention of a jury, and the court, having been thereunto requested by the appellants, the defendants below, made the following special finding of facts and conclusions of law thereon, to-wit:

"Come the parties as heretofore appearing and now the court, having been requested by the defendants, before the introduction of any evidence, to find the facts and conclusions of law, now makes the following finding of facts in the cause and the conclusions of law thereon:

"That the plaintiff, George W. Stout, in the spring of 1892, and for a number of years prior thereto and ever since, resided and was engaged in the wholesale grocery business in the city of Indianapolis, Indiana, and employed a number of salesmen to travel over the country, and make sales of his goods to retail dealers, and send in orders to plaintiff's wholesale house for said goods as such salesmen were able to sell to said retail dealers, and to collect the money due the plaintiff from said retail dealers for the goods so sold to them prior thereto, and that the said collections so made were remitted and reported to plaintiff by said salesmen at stated periods.

"That in February and March, 1892, the defendant, Ed. C. Scott, resided in the city of Crawfordsville, Indiana, and came to plaintiff's place of business in the city of Indianapolis, and applied for the position of traveling salesman, but was informed by the plaintiff that he had no position of this kind then open, but that he would employ the defendant as a porter in his wholesale house, and for his services would pay him the sum of one dollar per day.

"That the said defendant, Ed. C. Scott, accepted and entered upon said employment upon the terms aforesaid and continued to work in plaintiff's said whole-

sale house for a portion of about two or three weeks, when he was taken sick and returned to his home in Crawfordsville, where he remained a short time and until he recovered his health, when he returned to plaintiff's employment, and by the direction of the plaintiff was put to work about said store at a lighter class of work than he had heretofore been engaged in. That he so continued in said work for two or three weeks, and while so at work entered into a contract with plaintiff, of the following tenor and effect: That in consideration of the said defendant, Ed. C. Scott, furnishing the plaintiff with a satisfactory recommendation of his character and a good and acceptable bond in the sum of \$2,500.00, and would render his services to the plaintiff in the capacity of a traveling salesman, and would go upon the road as such throughout a specified territory, selling plaintiff's goods to retail dealers, taking and sending plaintiff orders for the same, and collecting money due to the plaintiff from his said customers, and remitting and reporting the same at weekly intervals to plaintiff; that plaintiff would pay to the said Ed. C. Scott forty per cent. of the gross profits on the sales made by the said Ed. C. Scott, less his expenses and forty per cent. of the losses on the goods so sold by him.

"That in pursuance of the terms of said contract, and as a part thereof and contemporaneous therewith, the said defendant, Ed. C. Scott, executed said bond sued on herein, and caused the same to be executed by his co-defendants, Samuel C. Scott, James R. Bryant and David W. Hughes, and the said Samuel C. Scott, David W. Hughes and James R. Bryant, sureties, having so signed the said bond, delivered the same to Ed. C. Scott, to be delivered by him to the plaintiff, George W. Stout, in compliance with the said contract of employment theretofore made between the said George

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W. Stout, plaintiff, and the said Ed. C. Scott, and the said Ed. C. Scott delivered the said bond to plaintiff on or about April 1, 1892, and said bond was then and there accepted by the plaintiff, which bond was in the words and figures following:"

The bond a copy of which is filed with the complaint is here set out in the finding.

"That there was a good, valid and sufficient consideration for the execution of said bond by said defendants. That immediately, or soon after the delivery of said bond to the plaintiff, and acceptance thereof by the plaintiff, and his recommendations aforesaid, the said defendant, Ed. C. Scott, entered upon the discharge of his duties as such salesman, under said contract, selling plaintiff's goods to retail dealers, sending plaintiff orders for the same and collecting from plaintiff's customers money due plaintiff, and so continued until about the 19th day of December, 1892, at which time he voluntarily quit plaintiff's services, and failed to report any orders for goods or remit any money or collections, and wholly disappeared and fled the State of Indiana, and is now a fugitive from justice and his whereabouts unknown.

"The court further finds between the date of the delivery of said bond by the said Ed. C. Scott, about April 5, 1892, and the 19th day of December, 1892, he, the said Ed. C. Scott, while so employed, collected and received for plaintiff's use and benefit from said plaintiff's said customers, in the aggregate, the sum of \$3,440.00, and appropriated the same to his own use, and embezzled the same and failed to deliver or pay the same, or any part thereof, to the plaintiff, or in any way account to the plaintiff for the same; which said amount of \$3,440.00 is still due the plaintiff, with interest thereon, and remains unpaid.

"That said bond so executed to the plaintiff by the

said defendants, Ed. C. Scott as principal, and Samuel C. Scott, James R. Bryant and David W. Hughes as sureties, was in the penal sum of \$2,500.00, conditioned that the said Ed. C. Scott would faithfully perform the duties of his said employment, and faithfully and truthfully report all his transactions and pay over to the said George W. Stout, plaintiff, all sums of money or notes by him received for his employer, the said plaintiff, then the said bond should be null and void, otherwise remain in full force and effect.

“That said bond was executed by each and all of the defendants in pursuance of the said contract of employment theretofore entered into, and between the plaintiff and the said Ed. C. Scott, and as a part of and contemporaneous therewith and before the said Ed. C. Scott entered upon the discharge of his duties in pursuance thereof. That the sureties on said bond had knowledge soon after the execution of said bond of the fact that the said Ed. C. Scott had taken employment with the plaintiff as such salesman under said contract.

“The court further finds that at the time and prior to the making of the contract of employment between plaintiff and said Ed. C. Scott, the plaintiff had no knowledge of any facts impairing the good character of said Ed. C. Scott, and did not learn of any rumors affecting his good character until after he had fled the country. That during all of said time said Ed. C. Scott was a married man and resided at said city of Crawfordsville, where his father, Samuel C. Scott, and James R. Bryant and David W. Hughes resided, and visited his home and the city of Crawfordsville on an average of every two weeks during all the time he was engaged with the plaintiff. That on the 24th day of December, 1892, the plaintiff, by his

letter to the several defendants other than the said Ed. C. Scott, notified them of the fact that the said Ed. C. Scott had defaulted on his contract and on said bond, and embezzled said money, which letter was duly received by the defendants, demanding payment.

"That there has been undue and unreasonable delay in the payment of the principal of said bond since notice of default and demand for payment.

"The court further finds that there has been a breach of the conditions of said bond, and that the plaintiff has been damaged thereby in the sum of \$2,500.00, with 6 per cent. interest since June 24, 1893, six months after notice, amounting in the aggregate to the sum of \$2,718.00, and that the defendants in this action, to-wit: Samuel C. Scott, James R. Bryant and David W. Hughes, are indebted to the said plaintiff in the said sum of \$2,718.00, which is due and unpaid.

"And as conclusions of law upon the facts, the court finds that the law is with the plaintiff, and that he is entitled to a judgment in this action against the defendants, Samuel C. Scott, James R. Bryant and David W. Hughes, in the sum of \$2,718.00, and the costs in this action, collectible with relief."

The appellants' motion for a new trial was overruled, and the judgment was entered against them in accordance with the special finding.

The appellants, James R. Bryant and David W. Hughes, jointly assign the following errors.

"1. The court erred in overruling the joint separate demurrer of said appellants, James R. Bryant and David W. Hughes, to the second and third paragraphs of the complaint.

"2. The court erred in sustaining a demurrer to the first and second paragraphs of the joint answer of said appellants, Bryant and Hughes.

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"3. The court erred in overruling the motion for a new trial.

"4. The court erred in its conclusions of law upon the facts found."

The appellants, James R. Bryant, David W. Hughes and Samuel C. Scott jointly assign the following errors:

"1. The court erred in overruling the motion for a new trial.

"2. The court erred in its conclusions of law upon the facts found."

In order to sustain the second error assigned by Bryant and Hughes jointly, it is necessary for them to show that both the first and second paragraphs of their answer are sufficient.

The ruling on the first paragraph has not been attacked in argument. Assuming the first paragraph to be insufficient the second error assigned by said appellants has not been sustained. *Everett v. Farrell*, 11 Ind. App. 185, 187.

The question presented by the other errors assigned is whether, in the absence of notice by appellee to appellants of the acceptance of the bond, the appellee can recover on the bond in this action.

The substantial facts, proven beyond any controversy, as to the execution of the bond, are these:

Ed. C. Scott applied in person to Stout for employment as salesman; Stout made a conditional contract of employment with him, and the condition was that Scott was to secure a bond in the sum of \$2,500.00; Scott said that he could get and give the bond; Scott then lived and continued thereafter to live at Crawfordsville, Indiana, and all of the appellants lived there; Scott went to Crawfordsville, and he and his father, Samuel C. Scott, one of the appellants, procured the execution of the bond in suit, and appellants

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then knew Ed. C. Scott would be employed by appellee "if he could give a bond," and this bond, so signed, was delivered by appellants to Ed. C. Scott, for delivery by him to Stout; and Ed. C. Scott brought the bond to Indianapolis and delivered it to Stout, and Stout accepted it, and closed the contract of employment, and at once, and under said contract and bond, Ed. C. Scott entered upon his said employment.

The contention of counsel for appellants is addressed more especially to the evidence, but the question is fairly presented in their argument in support of the demurrer to the complaint.

Is the bond in suit a contract of guaranty? Counsel rely on *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, as decisive of this question.

In that case, Judge Mitchell, with whom Judge Howk we presume concurred, held that the bond of the cashier was a continuing guaranty collateral to the contract of employment. On the other hand Judge Elliott, with whom Judge Zollars expressly concurred, held that the bond was an original undertaking on which the bondsmen were liable as sureties.

Judge Niblack declined to commit himself to the doctrine of that part of Judge Mitchell's opinion "which holds the bond sued on to be a contract of guaranty, and not of suretyship." All the judges concurred in the conclusion that the judgment against the cashier and the sureties on his bond should be affirmed.

It is quite clear to us that the question whether the bond was a contract of guaranty or suretyship was not determined in that case.

The distinction between a guaranty and a surety has been discussed in many cases in the Supreme Court and in a few cases in the appellate court and we cite some of them. *Nading v. McGregor*, 121 Ind.

465; *Wright v. Griffith*, 121 Ind. 479, 6 L. R. A. 639; *Bechtold v. Lyon*, 130 Ind. 194, 202; *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308; *Snyder v. Click*, 112 Ind. 293; *Shearer v. Peale & Co.*, 9 Ind. App. 282; *Conduitt v. Ryan*, 3 Ind. App. 1; *Lane v. Mayer*, 15 Ind. App. 382.

It will be noticed in *Nading v. McGregor*, *supra*; *Wright v. Griffith*, *supra*; *Bechtold v. Lyon*, *supra*; *Snyder v. Click*, *supra*; *Furst & Bradley v. Black*, *supra*; *Shearer v. Peale & Co.*, *supra*; *Conduitt v. Ryan*, *supra*, the contract signed by the sureties, or guarantors, in each instance, is a separate and independent writing or undertaking from the contract or obligation of the principal.

In *Conduitt v. Ryan*, *supra*; *Shearer v. Peale & Co.*, *supra*; *Nading v. McGregor*, *supra*, and *Wright v. Griffith*, *supra*, it was held that the contract sued upon was, in each case, an original or absolute undertaking and not a collateral, and that the signers were liable thereon as sureties, or as upon a contract in the nature of suretyship.

In this case and in *La Rose v. Logansport Nat. Bank*, *supra*, the action was brought on the contract executed jointly by the principal and the sureties or guarantors.

A guarantor "cannot as a general rule be sued with his principal, inasmuch as his liability arises strictly from his individual contract." *Conduitt v. Ryan*, *supra*.

Brandt in his work on Suretyship and Guaranty, says: "The contract of the guarantor is his own separate undertaking in which the principal does not join." Section 1, second edition.

The contract of guaranty is "not merely an engagement jointly with the principal to do a thing." *McMillen v. Bulls Head Bank*, 32 Ind. 11.

In this case the bond is an agreement that one of the obligors shall pay to the appellee all moneys received by him for appellee. There is no distinct or different liability on the bond. The liability of the obligors is on the same bond, accrues at the same time, and arises from one and the same breach of one and the same contract, and all of them may be jointly sued in one and the same action.

In this connection we quote from Judge Frazer's opinion as follows: "There is no case in the books to our knowledge, and some pains have been bestowed in their examination, in which one contracting jointly with the principal debtor has been deemed a guarantor." *McMillen v. Bank, supra*.

In *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, the undertaking of the guarantors was not a joint engagement with the principal. The contract signed by them was collateral to the separate agreement entered into by him.

Assuming, without deciding, that the bond in suit is a contract of guaranty, is it binding on appellants because they were not notified by appellee of his acceptance of such bond or guaranty?

On this question, "The distinction is drawn between an absolute guaranty and an offer to guaranty." Section 194, Brandt on Suretyship and Guaranty. In cases of absolute guaranty no notice of acceptance by the guarantee is required, and in cases of offer to guaranty notice of acceptance by the guarantee must be given to the guarantors.

In *Furst & Bradley Mfg. Co. v. Black, supra*, it is said: "Where, however, the guaranty is for the fulfillment of a contract already made, or for one executed contemporaneously with the contract of guaranty, or for the payment of an existing debt, or where the contract of guaranty is upon a consideration dis-

tinct from the credit extended to the principal debtor, and which moves directly between the guarantor and guarantee, notice of acceptance is unnecessary. In such cases the acceptance of the guaranty, and the performance of the consideration upon which it rests, are all that are essential to make the contract complete and enforceable." *Davis v. Wells*, 104 U. S. 159; *Wills v. Ross*, 77 Ind. 1, 40 Am. R. 279; *Kline v. Raymond*, 70 Ind. 271; *Cooke v. Orne*, 37 Ill. 186.

In the case of *Davis v. Wells*, *supra*, the syllabus is by Justice Matthews, who wrote the opinion, and part of the same is as follows:

"1. The rule, requiring notice by the guarantee of his acceptance of a guaranty and his intention to act under it, applies only where the instrument being, in legal effect, merely an offer or proposal, such acceptance is necessary to that mutual assent, without which there can be no contract.

"2. If made at the request of the guarantee, the guaranty becomes the answer of the guarantor to a proposal, and its delivery to the guarantee or for his use completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guarantee and constitutes its consideration."

In *Snyder v. Click*, *supra*, the Supreme Court said: "Under the evidence in this cause appellee's guaranty was fully executed by the delivery thereof, by his authority, contemporaneously with the execution of the written contract of lease, upon which such guaranty was endorsed for 'the fulfillment of the within contract,' and notice to appellee of appellant's acceptance of such guaranty was wholly unnecessary."

In that case the lease was written before, but was not signed by the lessor or lessee until the guarantee signed by the sureties or guarantors was delivered by

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the lessee to the lessor. The only material difference between that case and this is that in that case the lessee did not sign the contract or guaranty, and the payments guaranteed were a definite amount each month.

In *Furst & Bradley Mfg. Co. v. Black*, *supra*, the two contracts were executed as parts of the same transaction and it was held that notice of the acceptance of the undertaking signed by the guarantors was not necessary.

In *Bechtold v. Lyon*, *supra*, the performance guaranteed was not definite in its amount; but it was held that as the contract of guaranty was executed contemporaneously with the other contract, no notice of acceptance was necessary.

In *Wright v. Griffith*, *supra*, it was held that no notice of the acceptance of the guaranty is required where it is a part of the consummation of the contract to which it is collateral. It is there said: "Where, however, the delivery of the guaranty is not a mere incipient step in the transaction, but is in fact a part, or the consummation of the contract to which it is collateral, the acceptance of the guaranty and the performance of the consideration upon which it rests are all that are essential to make the contract complete and enforceable. *Snyder v. Click*, 112 Ind. 293, and cases cited; *Davis v. Wells*, 104 U. S. 159. * * *

"When the contract of guaranty is executed contemporaneously with, and as a part of, the consideration for the contract or transaction guaranteed, the law imputes notice to all the parties immediately related to the transaction of its character and extent, and no further notice of the acceptance of the guaranty is required. *Furst & Bradley Mfg. Co. v. Black*, *supra*; *Brandt Suretyship and Guaranty*, section 164; *Paige v. Parker*, 8 Gray 211."

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In this case appellants, with Ed. C. Scott, obligated themselves to pay over to appellee all sums of money received by him for his employer. The guaranty was executed by the delivery thereof to appellee as a part of the consummation of the contract between him and Ed. C. Scott. The bond was not a mere offer to guaranty, but was a conclusive and absolute undertaking to pay to appellee all moneys collected by Scott for him, and no notice of its acceptance was, under the circumstances, necessary. *Jackson v. Yandes*, 7 Blackf. 526, and authorities hereinbefore cited.

In the case in hand the bond is a joint engagement by appellants and the principal to pay to the appellee the money collected by Scott. The sureties or guarantors are jointly sued with the principal, but as the principal absconded, he was not served with process. We find no case in which the sureties or guarantors and the principal entered into a joint engagement, such as the one before us, wherein it has been held that notice of acceptance by the guarantee to the guarantors was required. The bond in suit, if a guaranty, is certainly one of conclusive guaranty and not a mere overture to guaranty, and if this is correct, no notice of acceptance was necessary. *Evans & Co. v. McCormick*, 167 Pa. St. 247, 31 Atl. 563, and authorities there cited.

In *Tolman v. Means*, 52 Mo. App. 385, the original contract was entered into between the salesman and his employers in Chicago. Several days after executing the contract of employment the salesman procured the guarantors to sign the guaranty undertaking. The salesman did not sign this instrument. The court held that notice to the guarantors was required, but that as the guarantors had knowledge that they were accepted, this was sufficient. See *Burns v.*

Harlan v. Jones.

Singer Mfg. Co., 87 Ind. 541; *Gage v. Lewis*, 68 Ill. 604, 618.

Judgment affirmed.

ON PETITION FOR REHEARING.

DAVIS, J.—On petition for rehearing counsel for appellants insist that the first paragraph of the answer of Bryant and Hughes was sufficient, and that the court erred in sustaining the demurrer thereto.

The substance of the paragraph of the answer is "that the plaintiff never, at any time, prior to the commencement of the suit, notified them that he had given employment to said Ed. C. Scott as such traveling salesman."

The contention of counsel for appellants is that notice to appellants that the bond had been accepted was necessary in order to make it obligatory on them. On careful examination and consideration of the question on the former hearing we were of the opinion that "no notice of acceptance was necessary."

Although counsel for appellants have reargued the question with great skill and ability we are of the opinion that our conclusion on the original hearing is correct.

Therefore no reason exists for granting a rehearing. Petition overruled.

HARLAN v. JONES.

[No 1,970. Filed December 1, 1896.]

MALICIOUS PROSECUTION.—*When Action For Will Lie.*—*Search Warrant.*—Procuring a search warrant to be issued may be made the foundation of an action for malicious prosecution, notwithstanding the affidavit on which such warrant was issued does not charge a crime.

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PRACTICE.—*Harmless Error.*—*Malicious Prosecution.*—Sustaining a demurrer to a paragraph of answer in an action for malicious prosecution, alleging the existence of probable cause, the non-existence of malice and the good faith of the action, is harmless, as such facts were admissible under the general denial.

From the Fayette Circuit Court. *Affirmed.*

D. W. McKee, J. I. Little and H. L. Frost,
for appellant.

Reuben Conner and J. M. McIntosh, for appellee.

GAVIN, J.—Appellee recovered judgment against appellant for malicious prosecution, by maliciously and without probable cause instituting proceedings for a search warrant and procuring a warrant commanding the searching of appellee's house for certain goods alleged to have been stolen.

The affidavit described the goods, averred they had been stolen and were believed to be concealed in a certain house known as the Cooley House, and further asked that if they were not found there that appellee's house should also be searched. The warrant was so issued and appellee's house searched by virtue of it.

It is contended by counsel that the complaint is bad because the "proceedings did not involve any charge of crime" against appellee.

That procuring a search warrant is such a proceeding as may be the foundation of an action for malicious prosecution is not and cannot be controverted. *Carey v. Sheets*, 67 Ind. 375; *Whitson v. May*, 71 Ind. 269; *Flora v. Russell*, 138 Ind. 153; *Tuell v. Wrink*, 6 Blackf. 249; *Fisher v. Hamilton*, 39 Ind. 341.

It is not requisite that the affidavit or indictment should have sufficiently charged the defendant with a crime to authorize him to maintain an action for malicious prosecution. *Stancliff v. Palmeto*, 18 Ind. 321;

Harlan v. Jones.

McCullough v. Rice, 59 Ind. 580; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Matlick v. Crump*, 62 Mo. App. 21; *Shaul v. Brown*, 28 Ia. 37; *Forrest v. Collier*, 20 Ala. 175; *Dennis v. Ryan*, 65 N. Y. 385.

The statute, sections 1688, 1689, Burns' R. S. 1894 (1619, 1620, Horner's R. S. 1896), which provides for the issuing of search warrants does not require that the owner of the premises to be searched shall be charged with the commission of a crime.

In the cases in 67 and 71 Ind. cited above, no such charge appears to have been made.

It comes with an ill grace from appellant to now say that his affidavit did not in law authorize the issuance of the writ when he expressly asked for it and obtained that which he asked, and subjected appellee to all the indignity which would have followed had the affidavit been in all respects sufficient.

In *Collins v. Love*, 7 Blackf. 416, it was expressly decided that in such suits as this the complaint is not objectionable because the alleged charge does not authorize the issuing of the warrant.

Appellant having instituted the proceeding maliciously and without any probable cause and prosecuted it to an unsuccessful termination must now answer for his wrong.

Appellant filed an answer of general denial together with two special paragraphs.

The second paragraph set up matters showing the existence of probable cause and the nonexistence of malice.

All these facts were admissible under the general denial. Consequently there was no harmful error in sustaining a demurrer to this answer. *Kniss v. Holbrook*, ante, 229.

The same may be said of the third paragraph, which also counts upon the good faith of appellant and his

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acting under the advice of a justice to whom he related all the facts.

The paragraphs were at best but special denials.

We find in the record no just cause for reversal.

Judgment affirmed.

THE CHICAGO AND ERIE RAILROAD COMPANY v. LONG.

[No. 2,026. Filed December 1, 1896.]

RAILROADS.—Damage by Fire.—Complaint.—In an action against a railroad company for damages caused by fire, a complaint alleging that the defendant negligently permitted a fire to originate on its right of way, and negligently permitted it to escape upon the plaintiff's lands, and to burn the soil and crops thereon, is sufficient to withstand a demurrer.

PRACTICE.—Examination of Witness.—Harmless Error.—The propounding to a witness, of an improper question, where the answer thereto is not responsive and contains no statement as to the issue being tried, is harmless error.

SAME.—Examination of Witness.—Leading Questions.—The use of leading questions in the examination in chief of a witness is within the sound discretion of the court.

From the La Porte Circuit Court. *Affirmed.*

W. O. Johnson, J. W. Crumpacker and William Johnson, for appellant.

F. E. Osborn and J. H. Bradley, for appellee.

LOTZ, C. J.—The appellee sued the appellant to recover damages done to his lands and crops by fire alleged to have been negligently permitted to escape from the appellant's right of way and recovered a judgment in the court below. The complaint is in four paragraphs. Dumurrers were overruled to each, and these rulings are assigned as error. The appellant,

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however, only considers the ruling as to the fourth paragraph, thereby waiving the rulings as to the others.

The fourth paragraph avers, in substance, that the defendant negligently permitted a fire to originate on its right of way, and negligently permitted it to escape upon the plaintiff's lands and to burn the soil and crops thereon. The paragraph is sufficient. *Chicago, etc., R. W. Co. v. Burden*, 14 Ind. App. 512.

The next error assigned is the overruling of appellant's motion for a new trial.

On the trial of the cause the appellee propounded to his witness, Iseminger, this question, "What, if anything, did Mr. Bailey say to Mr. Carroll about the fire having been started from an engine on the railroad, which was then burning?"

Appellant's objection to this question was overruled, but as the answer was not responsive to the question, and nothing was stated as to the origin of the fire, the error, if any, was harmless.

Objections were made to certain questions propounded to this witness as being leading. This was matter in the sound discretion of the court, and there was no abuse of that discretion in this instance.

The appellee's objection was sustained to certain questions propounded to appellant's witness, Penestone, relating to the value of the hay destroyed. But as the witness was subsequently permitted to give his opinion as to the value of the hay, there was no harm in this ruling.

Complaint is also made of other rulings of the court in excluding certain evidence offered by appellant. We have examined these objections and find no reversible error in the record.

Judgment affirmed.

The Springfield Fertilizer Company v. Tompkins.

THE SPRINGFIELD FERTILIZER COMPANY v. TOMPKINS.

[No. 2,040. Filed December 2, 1896.]

PRINCIPAL AND AGENT.—*Liability of Agent.*—A local agent for the sale of goods of a manufacturing company who has contracted with his principal to endorse all notes taken from customers for sales made of goods furnished him by such company is not liable for the payment of goods sold by a general agent of the company where the local agent informed the general agent at the time such sale was made that the purchaser was insolvent and that he would not endorse or guarantee such purchaser's note, although he ordered the goods together with other goods, charged himself with same, and notified the purchaser of the arrival thereof.

CONTRACT.—*Parol Evidence.*—Parol evidence is admissible to show that a certain transaction was independent of a written contract between the parties although such contract states that it contains all the contract between the parties and that no verbal agreement will be binding.

From the Rush Circuit Court. *Affirmed.*

W. J. Henley, L. D. Guffin, G. W. Morgan and Douglas Morris, for appellant.

W. A. Cullen and J. D. Megee, for appellee.

REINHARD, J.—Appellant sued appellee in the court below on an account, alleging in its complaint that the appellee was indebted to the appellant in the sum of \$100.00, for goods and merchandise sold and delivered to the appellee at his special instance and request, as shown by contract, a copy of which is filed with the complaint marked Exhibit "B" and Exhibit "C," and a bill of particulars of which is filed with the complaint marked Exhibit "A;" that the sum of \$91.20 was due December 25, 1891, and is wholly unpaid, although payment of said sum was demanded at the date of the maturity of said debt. Wherefore, etc.

The written and printed contract for 1892 provides

that "this paper contains the full and entire agreement between parties hereto and that no outside verbal understanding is of any force or effect, whatever, and is not to be held binding."

The contract further stipulates that Tompkins is appointed the agent of the appellant for the sale of Springfield Fertilizer "in Rushville and trade for the season of 1892." The appellant agrees to furnish the fertilizers to Tompkins in such quantities as the latter may from time to time order. Tompkins agrees to order of appellant as much of said fertilizers as the trade in said territory will demand, and to settle for the same as in the contract provided. The title in all fertilizers shipped to Tompkins, or their proceeds, is to be vested in the appellant and subject to its order, until full settlement has been made for the same by the appellee; but in case of loss by fire, the appellee is to be responsible for the same. Then follow the prices for the different brands of fertilizers, "delivered f. o. b., cars, at Rushville, Ind., in carload lots." It is further provided that all goods ordered are due and payable as follows: Tompkins to pay freights and deduct same from price of goods, 60 days. "Settlements to be made June 1, 189—, for all spring goods ordered, and October 1, 189—, for all fall goods ordered, in farmers' notes and cash, as fertilizers have been sold, except pure ground bone, which is net cash 30 days from shipment. All notes to be made payable at some bank, and to the order of the Springfield Fertilizer Co., said notes not to run longer than six months from date of sale for spring goods sold, and not longer than twelve months from date of sale for fall goods sold. Notes to draw 6 per cent. interest from date and to be guaranteed by Tompkins." Tompkins agrees to take no other agency nor to become interested in any way in the sale of any other fertilizers during the season of

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1892; also to circulate such advertising matter as may be supplied from time to time, and to diligently canvass the territory assigned, and to work up the trade faithfully. The company reserves the right to revoke the agency at any time when Tompkins shall fail or neglect to perform the duties thereof. The contract for the season of 1891, does not differ materially in its terms from that for the season of 1892.

The appellee answered the general denial and payment. The appellant's reply of general denial closed the issues. The cause was tried by the court and resulted in a finding and judgment for appellee.

The sole error relied upon is the overruling of the motion for a new trial. The grounds assigned in this motion are as follows:

"1. The decision of the court is contrary to law.

"2. The decision of the court is contrary to the evidence.

"3. The decision of the court is not sustained by sufficient evidence.

"4. The court on the trial of said cause permitted, over the objection of plaintiff, the defendant and Robert Tompkins, John Cohn and A. N. Norris each to testify that defendant told the agent of plaintiff that he, defendant, would not make any sale to said Norris and would not guarantee any note that might be given by said Norris for goods sold to said Norris by said agent of plaintiff, J. H. Spencer by name, in all of which the court erred."

It will be seen from the pleadings and contract above set forth that the appellee was the local agent for the appellant to sell fertilizers. The goods were to be shipped to him by rail, as required, and he was to sell them to farmers, taking their notes for the amount due, which notes were to be secured by the appellee's indorsement. It is manifest from this ar-

rangement that a large discretion was necessarily given the appellee as to the persons to whom such sales were to be made, for otherwise the appellee might be forced to incur risks and liabilities that an ordinarily prudent business man would not be willing to assume. There is evidence to prove that one John H. Spencer, a general agent of the appellant, who had authority to sell the appellant's goods and establish agencies, came to Rushville and informed the appellee that he was about to make a sale of a shipment of fertilizers to one Norris. Appellee protested that Norris was insolvent and that if a sale was made to him he, appellee, would refuse to indorse or guarantee any note that Norris might execute. Spencer, nevertheless, sold the goods to Norris and the fertilizers were shipped in bulk with a consignment sent the appellee on his order. Norris came to the car and received the fertilizers and executed his note to appellant for the amount due from him, delivering the same to the appellee. The appellee sent the note to the appellant, but refused to indorse it. The appellant now seeks to hold the appellee liable for the price of the goods sold to Norris, and this is the subject of controversy in this action.

If the court believed the evidence of the appellee, above alluded to, it was amply justified in its finding. The transaction with Norris was not in violation of the written contract between appellee and appellant. The appellant, for aught appearing in the contract, was at liberty to make any sales within the appellee's territory that it elected to make, but it certainly could not hold the appellee liable therefor on his contract. The appellant's learned counsel insist that the evidence as to such independent sale, was in plain contravention of the provisions of the written contract. Even if this were true, we do not see how

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the appellee could be bound by the transaction unless he had some connection with the sale. If he did not agree to the sale, but protested that he would not assume the responsibility for it, we do not understand by what principle of law he can be forced to make good the loss. But the sale to Norris by Spencer was not a violation of the contract. The appellant having the right to make such independent sales, and its agent Spencer having the general authority to do so, there was nothing in the contract between appellant and appellee which would prevent the performance of such an act. It is true the contract stipulates that it "contains the full and entire agreement between the parties thereto, and that no outside verbal understanding is of any force or effect whatever, and is to be held binding." But the transaction between Spencer and Norris had nothing whatever to do with the contract between these parties, and how the appellee can be said to have violated its conditions or provisions by refusing to assent to the act of Spencer is not easy to perceive. It is not the theory of appellee that he and Spencer had a private understanding that although the sale to Norris was to be effected through him, he was not to be held responsible for such sale, nor does the evidence relied upon by him warrant any such construction. On the other hand, as already stated, the appellee's evidence shows that the sale was made by Spencer over the appellee's protest and in the face of his declaration that he would not indorse the note. The evidence sustains the finding.

For the reasons already stated the court committed no error in admitting evidence to prove the transaction between appellant's agent, Spencer, and Norris, and what was said upon the subject between said Norris and appellee.

Nor can we say that the fact that Tompkins ordered

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the fertilizers, including that of Norris, and charged himself with it, and notified Norris of its arrival, is conclusive evidence that the sale to Norris was not an independent sale by Spencer, but was effected by Tompkins in the performance of his contract with appellant. That it was evidence of that fact we readily grant. But the court had other evidence and was not concluded by the establishment of this fact alone. It was the duty of the court to consider all the facts proved and then decide whether the sale was made by Tompkins in the course of his employment or was an independent sale by Spencer. The same is true as to the fact that Tompkins took the note. His acceptance of it and its transmission by him to appellant without his indorsement thereon, was not conclusive proof that the sale to Norris was a part of appellee's business under the contract between him and appellant. It was at most but a circumstance. Other circumstances relied upon affect only the weight of the evidence as do those already named.

We find no reversible error.

Judgment affirmed.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD
COMPANY v. MANNING.

[No. 2,131. Filed December 2, 1896.]

ESTOPPEL.—Garnishment.—An employe is estopped to question the regularity of proceedings by which his wages were garnished, or whether his employer was legally bound to pay the money into court, where he consented that his employer should pay into the court in which the garnishment proceedings were pending the amount of the claim and the costs and upon such payment he would accept from his employer the balance due him, which balance was tendered and refused.

Baltimore, etc., Railroad Company v. Manning.

From the Knox Circuit Court. *Reversed.*

W. H. De Wolf and *E. W. Strong*, for appellant.

H. Burns and *J. S. Pritchett*, for appellee.

ROSS, J.—This was an action to recover an amount alleged to be due appellee from the appellant, for services rendered, and for a penalty for its nonpayment, as provided by sections 7056 and 7057, Burns' R. S. 1894 (1596 and 1597, E. S.).

Under the specifications of error assigned, several questions are urged for our consideration, which we deem it unnecessary to examine or decide in the view we take of the case as presented by the record.

Whether or not the judgment rendered in the Kentucky court against the appellant as garnishee defendant was regular we need not determine, for it is apparent the appellee has no standing in court. It appears from the uncontradicted evidence that the appellee consented that the appellant should pay into the Kentucky court the amount of the claim and costs for which his wages in appellant's hands had been garnisheed, and he agreed that upon such payment he would accept from appellant the balance due him. The balance was tendered him and he refused, and brought this action. We think under these circumstances he is estopped to question either the regularity of the proceedings of the Kentucky court, or whether appellant was legally bound to pay the money into court. The money was paid into court with his knowledge and consent, and upon an agreement that when so paid in he would accept the balance due him from the appellant. The appellant has apparently acted in good faith, and it would be inequitable to permit the appellee to recover anything except the balance in appellant's hands after the payment into the Kentucky court of the claim and costs.

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The judgment of the court below is reversed with instructions to sustain the appellant's motion for a new trial.

HUBER MANUFACTURING COMPANY v. BUSEY.

[No. 1,618. Filed May 6, 1896. Rehearing denied Dec. 2, 1896.]

PLEADING.—Answer.—Counterclaim.—No single pleading can serve the double purpose of an answer and a counterclaim, and when such pleading seeks affirmative relief it will be treated as a counterclaim.

NOTICE.—When Written Notice is Waived.—In an action upon a contract which provides that no right of action shall accrue until the opposite party has had notice in writing, such notice must be given unless waived, before a right of action will accrue; but if a verbal notice is given, accepted, and acted upon the giving of the written notice is waived.

PLEADING.—Exhibit.—Foundation of Action.—A written order mentioned as having been given for the purchase of the article warranted, unless it contains the warranty relied upon, need not be set out as an exhibit in a pleading founded upon a breach of warranty.

APPEAL AND ERROR.—Bill of Exceptions.—A bill of exceptions, even though it contains the original longhand manuscript of the evidence, should be embodied in the transcript of the record, and not merely attached to the transcript or filed as an independent document.

From the Miami Circuit Court. *Affirmed.*

Roscoe Kimple, for appellant.

J. H. Neff, *Hood P. Loveland* and *Robt. J. Loveland*, for appellee.

ROSS, J.—The appellant brought this action in replevin to recover possession of one grain separator "with straw stacker, belts and all the fixtures and appendages with or belonging to the same, and also one truck wagon under the same. One Atlas steam engine, * * * with hose, and all fixtures and ap-

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pendages with or belonging to the same. Also one main drive belt and all belts used in and about said separator, engine, and machinery," all of which were alleged to be unlawfully detained from appellant by appellee. To the complaint appellee filed an answer in two paragraphs, and a counterclaim in one paragraph. A demurrer was sustained to the second paragraph of the answer. The counterclaim was designated and filed as "an answer and counterclaim." A demurrer for want of facts to constitute a cause of defense or to state a cause of action or counterclaim was filed to this plea and overruled.

The first four specifications of error assigned in this court call in question the sufficiency of the third paragraph of appellee's answer or counterclaim.

No single pleading can subserve the double purpose of an answer and a counterclaim.

Under the pleading denominated as an answer or counterclaim the appellee sought affirmative relief against the appellant, hence it was not an answer to appellant's complaint, but was a cross-action or counterclaim and its sufficiency must therefore be tested as such.

In his counterclaim, the appellee seeks to show by the facts alleged that he is the owner and entitled to the possession of the Atlas engine and drive belt, described in appellant's complaint, and which was taken from him and delivered to appellant under and pursuant to the writ of replevin issued on appellant's complaint, and he alleges that by reason of such taking, and the retention thereof by appellant, he has been deprived of its use and damaged thereby in the sum of \$500.00. He also asks for the return thereof, and for damages on account of the taking and its retention. With this counterclaim appellee filed as exhibits several instruments in writing, from which, taken in

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connection with the facts alleged, it is shown that on the 25th day of April, 1892, the appellee purchased from appellant, "one steam separator with 32-inch cylinder, and 48-inch separator with one bagger; one brake and one flax sieve, which separator included one truck wagon under the same." That in payment therefor he executed his three promissory notes, payable in bank, due November 1, 1892, November 1, 1893, and November 1, 1894, the first calling for \$149.00, and the others for \$148.00 each. To secure the payment of such notes when due he gave a chattel mortgage on the machinery, etc., purchased, and other machinery then owned by him. That when appellant sold the machine to appellee, appellant warranted it to do certain work, and that it failed to do the work warranted, and appellant failed to remedy the defects, although notified thereof.

The first objection urged to the sufficiency of the counterclaim is "that it is not alleged that any written notice whatever was ever given to the appellant, or any of her agents, stating wherein the separator failed to fill the warranty made in the written contract."

We have looked in vain for any allegation in the counterclaim that the warranty of appellant was reduced to writing, or that in case the machinery failed to meet the terms of the warranty the appellee was to give appellant notice thereof in writing. Counsel's argument on this question has not been confined to a consideration of the facts alleged in the counterclaim, but he has had in mind probably the evidence, and confounded that with the facts alleged.

It may be conceded as true that in an action upon a contract, whatever its nature, which provides that no right of action shall accrue until the opposite party has had notice in writing, such notice must be given,

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unless waived, before a right of action will accrue. But if a verbal notice is given, accepted, and acted upon, where a written notice has been stipulated for, the giving of the written notice is waived.

It is next urged that the counterclaim is bad because a copy of "the written order on which the machinery was ordered" was not filed with and made a part thereof.

It is alleged in the counterclaim that upon certain representations made by appellant's selling agent, which representations are specifically alleged, appellant "was induced to and did sign and deliver to plaintiff (appellant) a written order for said machine, a duplicate of which is herewith filed as exhibit 'A,' " The counterclaim is not predicated upon this order given by appellee, and so far as the facts alleged disclose, the warranty of appellant which was the inducement to appellee to purchase the machine was not embraced in the order. If the order was not the foundation of the appellee's action, it was not proper to file it with or make it a part of his counterclaim. Whether the theory of appellee's counterclaim is to recover possession of property taken from him and unlawfully detained by appellant, or for breach of a warranty, or both, we need not determine, but so far as any objection has been pointed out, we think, it states facts sufficient to entitle appellee to affirmative relief against appellant.

Inasmuch as we have decided that this pleading is a counterclaim and not an answer, it is unnecessary to say anything with reference to its sufficiency as an answer, or its effect if insufficient as such. Counsel has cited many authorities holding, and we believe it is well settled, that it is error to overrule a demurrer to an insufficient answer, and that a judgment will be

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reversed therefor unless the record shows affirmatively that the party was not injured thereby.

The last specification of error is that the court erred in overruling appellant's motion for a new trial.

The jury by their verdict found that the appellant was entitled to the possession of the grain separator with straw stacker, belts, fixtures and appendages, and one truck wagon under the same. They also found that the appellee was the owner and entitled to the possession and return of the Atlas steam engine with hose and all fixtures and appendages with or belonging to the same. Also one main drive belt. And they assessed appellee's damages against the appellant for the taking and detention of said property at \$50.00.

There was ample evidence from which the jury might find that the separator did not do the work it was warranted to do, hence that there was a breach of the warranty. But it is contended that although appellant warranted the machine to do good work it was agreed by the parties, and stipulated by the terms of said warranty, that "If inside of ten days from the day of its first use the said machinery fails to fill said warranty, written notice shall be given The Huber Manufacturing Company, Marion, Ohio, by registered letter, and also to the local agent from whom the same was purchased, stating wherein it fails to fill the warranty, and a reasonable time shall be allowed to get to the machinery to remedy the defect, if any there be, and an opportunity offered thereafter for a fair trial (if it be of such nature that remedy cannot be suggested by letter), the undersigned rendering necessary and friendly assistance. If the machinery cannot be made to fill the warranty, the part which fails shall be returned by the undersigned (the appellee) to the place from whence he received it, and another shall

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be substituted which shall fill the warranty. * * *
It is further mutually understood and agreed that the continued use of said machinery after the expiration of the time named in the above warranty, shall be evidence of the fulfillment of the warranty."

It has been held by this court in an action brought to recover the purchase price of a machine sold, where the seller has warranted the working of the machine in terms very similar to those contained in the warranty above set out, and also providing for the giving of a written notice to home office if the machine failed to work, and to allow a reasonable time to get to the machine and remedy the defect, that the purchaser could not declare a breach of the warranty until he had given the notice he agreed to give, and had allowed the seller, after receipt of such notice, a reasonable time to get to the machine and to remedy the defects. That the giving of the notice and allowing of a reasonable time to remedy the defects were conditions precedent to the purchaser's right to declare a breach of the warranty. *Sciberling & Co. v. Rodman*, 14 Ind. App. 460. But if it were conceded that the appellee did not give notice to appellant by registered letter as provided in the agreement, still we are unable to see what effect that would have upon the result in this case, when it clearly appears that the appellee recovered nothing from appellant on account of the supposed breach of the warranty. The appellant was awarded possession of the machine, belts, fixtures, etc., which it sold to appellee, while appellee was adjudged to be the owner and entitled to the possession of a steam engine, fixtures, belts, etc., which the appellant took from him by its writ of replevin. For this taking and the unlawful detention thereof the jury assessed damages against the appellant in the sum of \$50.00. Nowhere in the argument

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of counsel for appellant is it insisted that the evidence does not sustain the verdict of the jury that appellee was the owner and entitled to the possession of the steam engine, fixtures, belts, etc., or that they were not wrongfully taken and unlawfully detained from him. Whether or not the evidence is sufficient to sustain the verdict in that respect we do not consider, because that question is not urged for a reversal.

It is also urged that the court erred in admitting evidence as to the value of the use of the steam engine from the time it was taken by appellant until the trial of this cause. It is undisputed that the engine was taken on the 15th day of December, 1892, while the question objected to was: "What would be the value of the use of that particular engine in that neighborhood from about December 15, 1892, to the present time?" The objection to the question being that it is not limited in time to December 15, 1892, but that by the use of the preposition "about" the witness could and probably did, in estimating the value of its use, consider a longer time than from December 15, 1892. There is no merit in this contention.

Other objections to evidence admitted need not be considered, because the evidence thus objected to relate to the capacity and proper working of the separator, and inasmuch as appellant was found to be entitled to its possession, and appellee was not allowed anything on account of the supposed breach of the warranty, the admission of the evidence could not have been harmful.

The court did not err in refusing to give the ninth and thirteenth instructions of those tendered by the appellant, neither was it error to modify the thirteenth and give it as modified, nor to give the seventh and eleventh instructions of those tendered by the

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appellee, nor the third and fourth instructions given by the court of its own motion.

It is probably proper to suggest that while we have examined the evidence and decided the questions requiring its consideration there is serious doubt as to its being properly before us. A bill of exceptions even though it contains the original longhand manuscript of the evidence should be embodied in the transcript of the record. It is not proper to file a bill of exceptions in this court as an independent document, neither should it merely be attached to the transcript. If it is to be considered as a part of the record it must be embraced in and not merely attached to the transcript.

Judgment affirmed.

SHEPHERD v. MARVEL.

[No. 2,137. Filed December 3, 1896.]

JUDGMENT.—*Complaint to Set Aside Default.*—*Sheriff's Return not Conclusive.*—In a proceeding under section 399, Burns' R. S. 1894, to set aside a default and to be relieved from a judgment, the plaintiff may show that the summons was not in fact served upon her, and that she had no notice of the pendency of the action against her, notwithstanding the fact that the sheriff's return shows service by copy at her residence.

SAME.—*Relief From Judgment Taken by Default, After Sale.*—The mere fact that a sale had been made under a judgment and the judgment satisfied of record, does not deprive one against whom the judgment was taken, of relief under section 399, Burns' R. S. 1894.

PLEADING.—*Demurrer.*—*Harmless Error.*—Sustaining a demurrer to a bad pleading is harmless error, although the demurrer is insufficient to test the pleading.

From the Sullivan Circuit Court. *Affirmed.*

J. T. Hays and J. H. Drake, for appellant.

John S. Bays and Silver Chaney, for appellee.

GAVIN, J.—Appellee filed her complaint to have a default set aside and to be permitted to answer and defend against the complaint of appellant, under section 399, Burns' R. S. 1894 (396, Horner's R. S. 1896).

She showed a good defense to his complaint and that while summons had been regularly issued for her and returned, duly served by copy, at her residence, yet the sheriff had in fact left the copy at her son's residence instead of her own, the son being a co-defendant, and the officer acting under the belief that it was the son's wife who was named therein.

Appellee's ignorance of the pendency of the proceedings and her prompt action upon learning thereof are properly averred.

Appellant contends that appellee is estopped by the sheriff's return from asserting that she was not in fact served, even as a basis for relief for excusable neglect. *Nichols v. Nichols*, 96 Ind. 433, and cases cited therein, are urged in support of this position.

In so far, however, as they do sustain the contention, they are overruled by the later case of *Nietert v. Trentman*, 104 Ind. 390, where, after full consideration, it was held that while the sheriff's return is conclusive to establish the fact of service, so far as to confer jurisdiction of the person of the defendant, yet that "under the statute, for the purpose of rendering an excuse for not appearing and defending the action, the defaulted party may show that the summons was not in fact served upon him, and that, hence, he had no knowledge of the action."

There is no room for distinction in any material feature between that case and this.

Counsel press *Cully v. Shirk, Exr.*, 131 Ind. 76, as establishing a different doctrine and being similar to the case in hand. We do not so read it. There, no relief was sought for excusable neglect with a showing of

good defense and a request for opportunity to make it, as we have here, but it was simply demanded that the judgment be declared null and void for want of jurisdiction of the person of the defendant.

The 104 Ind. case is referred to with tacit approval in *Thompson v. McCorkle*, 136 Ind. 484, and has not been, so far as we are advised, in any manner limited or disapproved.

Appellant set up by way of answer that at the time of the institution of this suit execution upon the judgment had duly issued, upon which, before the filing of the paragraph of complaint here relied on, real estate of appellee was duly sold and the execution returned satisfied. It is urged that because the judgment was thus satisfied of record this proceeding can not be maintained.

In the absence of any averment to the contrary, we might presume that appellant was himself the purchaser at this sale. There is nothing to show that he or the purchaser, whoever he may have been, was ignorant of the true state of the facts relative to the service of the summons.

The mere fact that a sale had been made under the judgment would not deprive her of relief. See *Dickerson, Admr., v. Davis*, 111 Ind. 433; *Nash v. Cars*, 92 Ind. 216, where relief was granted after sale.

If the proper parties were not in court that should have been made to appear by the answer. Section 346, Burns' R. S. 1894 (343, Horner's R. S. 1896).

It cannot be said that appellee was negligent in not taking steps to prevent the sale, and should, therefore, be denied her day in court in the absence of any showing that appellant, or anyone else, was in any way misled by her conduct. The first and second paragraphs of the complaint to which demurrers were sustained, and which were filed before the third, upon

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which judgment was rendered, were abundantly sufficient to apprise appellant of appellee's rights.

The demurrer to the answer having been sustained, and the answer being bad, it cannot avail appellant, even though the demurrer was itself insufficient to properly test the answer. *Blue v. Capital Nat. Bank* 145 Ind. 518; *Bell v. Hiner*, ante, 184, and cases there cited.

Judgment affirmed.

BARNETT V. STEVENS ET AL.

[No. 1,896. Filed April 17, 1896. Rehearing denied Dec. 3, 1896.]

MECHANIC'S LIEN.—*For Material Specially Designed.*—*When Waived.*—A mechanic's lien which has attached to a building on account of materials which have been specially designed and prepared for the repair of the building, but which have not been actually placed therein, is waived where the materialman, after the repudiation of the contract by the owner, and after the lien has been filed, asserts title to the materials, furnishes the same under a new and independent contract with the purchaser of the premises, and it is not revived by a judgment obtained by the original owner declaring the conveyance fraudulent. pp. 430-438.

SAME.—*How Obtained.*—A mechanic's lien cannot be acquired by intention, implication, inference, or contract. It can only be acquired by giving the notice prescribed by the statute after the labor has been performed or material actually or constructively furnished. p. 437.

From the Carroll Circuit Court. *Reversed.*

Pollard & Pollard and *M. Winfield*, for appellant.

De Witt C. Justice and *John H. Gould*, for appellees.

DAVIS, J.—The court below made a special finding of facts and conclusions of law thereon. Appellant excepted to each and every conclusion of law. Appellant also moved for judgment in his favor upon the

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special finding, which was overruled, and he excepted. Appellees' motion for judgment on special finding was sustained and appellant excepted. These rulings of the court below are assigned as error. The special finding of facts and conclusions of law thereon are as follows:

"First—On the 14th day of May, 1890, the defendant, Atwater C. Barnett, was the owner, in fee simple, of lot number 47, in the original plat of the town, now city of Logansport, Cass county, State of Indiana, on which was situated a brick hotel. That on said 14th day of May, 1890, the plaintiffs, under the firm name and style of Stevens & Bedwards, and the defendant, Atwater C. Barnett, entered into a contract in writing for the furnishing of material and the performing of labor in repair upon said hotel by the said plaintiffs, to-wit:

"LOGANSPORT, IND., May 4, 1890.

MR. A. C. BARNETT, CITY:

We propose to furnish and put in place four Victoria closets, seats and tanks, nickle-plated flushing and supply pipes; one three-stall urinal, stationary, marble, nickle-plated trimmings; change the old wash basins; put in place of compression cocks, nip low down cocks; connect all to sewer in basement; cocks, fillings and ventilation pipes all in first-class manner, for the sum of \$589.00, \$289.00 to be paid when the job is completed; \$100.00 in 30 days; \$100.00 in 60 days; \$100.00 in 90 days from time job is completed.

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"In consideration that the closets and urinals are to be put in down stairs, where the present soil pipe connections are already in, and we agree to add two closets to this contract, and in the named price.

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"Said work and fixtures were intended by said Barnett to take the place of other urinals and closets then in said hotel, at a place then pointed out by said Barnett, and upon special designs and patterns named by said Barnett, to which plaintiffs assented. After the making of said contract the plaintiffs took the measurements in the hotel and drew the plan on paper for the proposed work, and gave the order to the planing mill for the doors and partitions, and ordered the urinals, and the marble to be cut, and the shapes required, and made the brass castings and other parts to the design and contract, and on the 20th day of June the plaintiffs had finished up, in their shops at Logansport, all of said material with the fittings and connections, and ready to be set up in the said Barnett Hotel, as provided in the contract, and the work and labor, and the value of the materials which had been used in the fashioning and building said job were, at the time, of the value of \$435.00. Said material, as framed and fashioned for the Barnett Hotel, was not adapted to any other building in the city of Logansport, and could not be used in that city without considerable change and loss of value, and it was unmarketable. That on the 20th day of June, 1890, the plaintiffs had not done any work upon the hotel on lot No. 47, except the taking of the measurements aforesaid, nor had they delivered any of the material upon the grounds, but still had the same in their possession in their shops at Logansport, ready, formed and prepared for placing in position in said hotel.

"Second—That on the 20th day of June, 1890, the defendant, Atwater C. Barnett, having sold his said real estate, notified the plaintiffs in person that he had sold said hotel, and countermanded the order heretofore given on said 4th day of May, for said material

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and work, and gave the said plaintiffs notice that he did not wish them to carry out said contract, and refused to allow them to put into said hotel said urinals, closets and other work, and forbade plaintiffs to carry out said contract and complete said work; and there after, on the same day, plaintiffs tendered said Barnett said urinals, closets and other work, and offered to set them up and complete them in said hotel in accordance with said contract, but Barnett refused to accept said offer, or to allow said work to be done, and requested plaintiffs to see the persons to whom he had sold said hotel about the same.

“Third—That on the 19th day of June, 1890, said Atwater C. Barnett sold his hotel to one Emily A. Clark, and executed to said Emily A. Clark a deed for said property and put the said Emily A. Clark and her husband, Len. J. Clark, in the possession of said property on the 20th day of June, 1890, and said Barnett at once left the State of Indiana, and for some time thereafter resided in the city of Chicago, in the state of Illinois. That on the day before said hotel property was sold by Barnett to Clarks, Barnett notified plaintiffs that he was about to sell, and if he should sell he would not want the improvements ordered.

“Fourth—That on the 20th day of June, 1890, the day after the sale found in item No. 3, and on the day that said Clarks took possession of said hotel, the plaintiffs filed in the recorder's office of Cass county, Indiana, a notice of their intention to hold a lien upon said property for material furnished and work done under said contract of May 4th, 1890, which was recorded in the recorder's office of Cass county, Indiana, in Miscellaneous Record 6, page 69, at 3 o'clock p. m. of said June 20, 1890, a copy of said notice in the words and figures, to-wit:

“To Atwater C. Barnett and All Others Whom it

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May Concern: You are hereby notified that we intend to and do hold a lien upon the following described real estate to-wit: Lot No. 47 in the original plat of the town, now City, of Logansport, in Cass county, in the State of Indiana, and on the hotel building thereon situate, known as the Barnett Hotel, for the sum of \$589.00 for labor performed and goods and materials furnished for repairing and altering said Barnett Hotel building on said real estate, and renovating the plumbing service of said building; said goods and materials consist of urinals, water closets, and plumbing prepared on special order, and in place, specially made and furnished for said hotel building, within 60 days last past before this notice, June 20, 1890.

A. W. STEVENS,

WILLIAM BEDWARDS.

“Received for record at 3 o'clock, p. m., June 20, 1890, and recorded in Miscellaneous Record 6, page 69.

HENRY HUBLER, Recorder Cass County.’

“Four and one-half—That on the 16th day of June, 1890, defendant Barnett notified plaintiffs in writing that he was negotiating for the sale of his hotel property, and if the sale was consummated he would not want the improvements provided for in their said contract.

“Fifth—I find that on the 20th day of June, and on the 16th day of June, 1890, the plaintiffs had ordered material for the work to be done under said contract, and had said material on hand in their shop in the city of Logansport, Cass county, Indiana, which was the place of business of the said Stevens & Bedwards, and that they had performed all of the work upon said material in adjusting it for use in said building as provided in said contract of May 4, 1890, excepting the putting in place in said building, but the plaintiffs still had, on the 20th day of June, 1890, possession of

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said material in their shop at Logansport, and none of it had been delivered to the defendant, Barnett, on lot 47, nor had there been any work done on the hotel in the performance of said contract, except measurements of the place where said urinals and closets were to be placed.

“Sixth—I further find that the closets and tanks ordered by the plaintiffs to fill the contract of May 4, were such water closets and tanks as could have been used elsewhere than in the hotel upon lot 47, of the defendant, Barnett, only by expensive changes and work, they having been manufactured especially for said hotel; and the urinals could have been adjusted so as to be used in other places than in said hotel, only by expensive changes and work, they having been manufactured especially for use in said hotel at the places provided in said contract, and pointed out by said Barnett.

“Seventh—I further find that the said Emily A. Clark and her husband, Len. J. Clark, under said conveyance, remained in the possession of said hotel during the months of July and August, 1890, and from and after June 20, 1890. That on the 29th day of July, 1890, the plaintiffs, under the firm name of Stevens & Bedwards, entered into a written contract with said Emily A. Clark and Len. J. Clark, for the performance of the same labor and the furnishing of the same material on and for the hotel situated on said lot 47, which written contract is in the words and figures following, to-wit: ‘This contract and agreement made and entered into this 29th day of July, 1890, by and between Stevens & Bedwards party of the first part, and Emily A. Clark and Len. J. Clark, parties of the second part, witnesseth: That said Stevens & Bedwards for and in consideration of the sum of five hundred and fifty-five dollars (\$555.00), to be paid by

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the said party of the second part, as hereinafter stipulated, agree to furnish the materials and make and construct the following work and repairs in and to the Barnett Hotel building, situated upon lot number forty-seven (47) in the original plat of the town, now city, of Logansport, in Cass county, in the State of Indiana, to-wit: Said party of the first part agree to set up one three-stall urinal in the room in the basement of said hotel where the old urinals now are; said urinal to have three stalls; the sides and back and the partitions between the stalls to be of Italian marble, and the bottom of slate, and a urinal to be set in the middle of the back of each stall, all the trimmings to be nickel plated; also one automatic flushing tank, the tank to be connected with galvanized pipe, the waste pipes to be connected with the sewer now in the hotel, to which the present urinal is connected; also that they will put in six (6) Crescent Water Closets with cherry finished seats and tanks, connect them with lead and galvanized pipe; connect the pedestals with the sewer now in said hotel to which the present closets are connected; to ventilate said closets by a ventilator extending up through the present flue in the wall and two feet above the roof; put up partitions between the water closets with panel doors hung on hinges working both ways, each door to be provided with a sliding bolt, the partitions and doors to be stained cherry color, to correspond with the closet seats, and varnished; said closets to be put in the room where the closets now are, and the same one in which said urinal is to be placed; all the woodwork in said room is to be stained a cherry color and varnished to correspond with said water closets, and the walls and ceilings of said room to be painted a steamboat white color.

“It is understood between the parties that the

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goods furnished are the same as those ordered by A. C. Barnett and exhibited to said party of the second part; and that all of said goods are of first-class material and all the work shall be done in first-class workmanlike manner. Said Stevens & Bedwards are to have all of the old material taken out and replaced by said new urinals and water closets. In consideration whereof the said party of the second part hereby agree to pay to the party of the first part the sum of five hundred and fifty-five dollars (\$555.00) as follows: One hundred and fifty-five dollars (\$155.00) to be paid when said urinal stalls are up; two hundred dollars (\$200.00) in three months from date of completion of work; and two hundred dollars (\$200.00) in six (6) months from date of completion of work, all payable with interest at the rate of 8 per cent. from maturity until paid, with 5 per cent. attorney's fees without relief from valuation or appraisement laws.

"When said work is done and said sum of five hundred and fifty-five dollars (\$555.00) is paid in full as herein stipulated to be paid, then said Stevens & Bedwards are to cancel and satisfy the mechanic's lien placed by them on said hotel property for the construction and repair of said urinal and water closets.

"In witness whereof the parties hereto have hereunto set their hands and seals this 29th day of July, 1890.

EMILY A. CLARK, [Seal.]
LEN. J. CLARK, [Seal.]
STEVENS & BEDWARDS, [Seal.]'

"And between that and about the 20th day of August the plaintiffs took the same material which had been purchased by them and fitted for the performance of the Barnett contract, and which were exhibited, at the time of the making of said contract with the said Clarks, to the said Clarks, and furnished them under

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their said contract with the said Clarks, and completed the same, and the work thereon, on or about the 20th day of August, 1890; the said Barnett did not execute said contract between the plaintiffs and the Clarks, and had no knowledge of its execution at the time it was executed; and the court further finds that said contract of plaintiffs with said Clarks was not intended by the parties thereto to be a waiver of said mechanic's lien, recorded in Miscellaneous Record 6, at page 69, in the recorder's office of Cass county, Indiana.

"Eighth—-I further find that on or about the 17th day of September, 1890, said Atwater C. Barnett instituted suit in the Cass Circuit Court against the said Clarks and one William H. Clark to set aside the deed made to the said Emily A. Clark for said lot 47, on the ground of fraud, and in said complaint asking for an accounting between him and the said Emily A. Clark for rents and property in said hotel used, and offering to pay back to said Clarks the balance that might be found due to the said Emily A. Clark upon such accounting. That such proceedings were had in said suit that the defendant thereto, the said Clarks, and co-defendants, Griffins, to whom the said Clarks had sold, filed a counterclaim for improvements made upon said hotel after the said 19th day of June, 1890, by them, and among the improvements claimed for were the improvements made by the said Clarks under their aforesaid contract with the plaintiffs; that a trial was had in the Cass Circuit Court and an accounting was had between the parties upon the issues thus raised, and evidence heard as to the value of improvements made by the said Clarks under their said contract with Stevens & Bedwards, and by the judgment of the Cass Circuit Court, rendered on the 15th day of May, 1891, said sale to the Clarks was set

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aside and adjudged to have been fraudulent and void; and on said accounting a balance was found due to the said Clarks and Griffins in the sum of \$700.00, which, by the judgment of the Cass Circuit Court, the defendant, Atwater C. Barnett, was ordered to pay, and by the judgment of said court said Barnett was put into the possession of said hotel and declared the owner thereof; that he has paid said judgment of \$700.00 found due on said accounting, and has been, ever since said judgment, and still is the owner in fee of said lot 47, and in possession of the same using and appropriating the urinals, closets, and other work put in by plaintiffs under theirsaid contract with Barnett, and their said contract with Clarks. Plaintiffs, Stevens & Bedwards, were not parties to said suit. That the defendant, Atwater C. Barnett, in said accounting was charged with the value of said improvements made by the said Stevens & Bedwards for the Clarks under said contract of July 29, 1890.

“Ninth—The present action was begun April 28, 1891, and there is a return by the sheriff of ‘not found’ as to Emily and Len. Clark, and a reasonable attorney’s fee for the plaintiffs’ attorneys in prosecuting this suit is \$150.00.

“Tenth—I find that the plaintiffs performed the labor and furnished the material under their said contract with Barnett to amount and value of \$589.00, of which \$150.00 was paid them by said Clarks on the 20th day of August, 1890, and there was due thereon, at the time of the institution of this suit, \$439.00 upon which plaintiffs should have interest to this date. That plaintiffs have received no other sum upon either of said contracts from anyone, and said \$439.00 with interest, and said \$150.00 attorney’s fees is due plaintiffs from said defendant, Barnett, and unpaid.

“From the facts found the court concludes, as mat-

ters of law, that said contract of plaintiffs and Clarks is supplemental to said contract of plaintiffs and Barnett; that plaintiffs, by virtue of their mechanic's lien, acquired a lien on lot 47, in the original plat of the city of Logansport, Indiana, the same being in Cass county, which had effect from and after 3 o'clock, p. m., of June 20, 1890. That plaintiffs should recover of and from the defendant, Atwater C. Barnett, the sum of \$690.00, of which \$439.00 is principal; \$101.00 interest, and \$150.00 attorney's fees, and that plaintiffs have foreclosure of their mechanic's lien as aforesaid, and the sale thereof, according to law, in the satisfaction of said sum and the taxable costs against the said defendant."

The general rule is that in order to acquire a lien under our statute it is necessary for the materialman to show that the improvement was made by the authority of the owner of the real estate, and that he furnished the material for the building, and that such material was used in the building, and that within the time prescribed by the statute he filed in the office of the recorder of the county the proper notice of his intentions to hold such lien. *Clark v. Huey*, 12 Ind. App. 224.

The language of the statute is that such notice shall be filed "within sixty days after performing such labor or furnishing such material." Section 7257, Burns' R. S. 1894. In this connection we quote from the case last cited: "The lien is not the creature of the contract, but of the law. It is the law, and not the contract, which gives the lien."

In order to entitle a materialman to maintain a lien he must furnish the material for the purpose of being used in the building. It is not enough that the material was actually used in the building. *Jones v. Hall*, 9 Ind. App. 458. The materialman or laborer cannot

have a lien for material furnished for a building, or for work performed thereon, so long as the title to such material or work remains in the materialman or laborer. The materialman must part with his title to the material before he can acquire a lien therefor. If he may in any case assert such lien before the material has been actually used in the building, it is on the theory that the material has been furnished by him for the building under such circumstances that the title thereto has vested in the owner of the building. In this case the material and work are one and the same. Therefore, if appellees had not parted with the title to the material and work in question on the 20th of June, 1890, they did not acquire a lien upon the real estate by the notice filed on that day in the recorder's office. In other words, who owned "all of said material with fittings and connections" when the notice was filed? If the facts disclose that the title thereto was then in appellees, no lien was created by the notice, because there is no provision in the statute under which appellees could, on the 20th of June, acquire a lien for material furnished by them for the building after that date. In order to furnish material for a building, under our statute, there must be, certainly, either an actual or constructive delivery of the material at or near the building. In no event can material, the title to and possession of which is retained by the materialman or owner, be said to have been furnished for the building. It necessarily follows that a materialman cannot acquire a lien for material which he has prepared or intended for use in a building, which he has not either actually or constructively furnished at or near the building for that purpose. If he has furnished the material for the building and has filed the necessary notice to secure the lien, he cannot afterwards assert any interest in such material inconsistent with

the rights of the owner of the building and retain his lien. If he thereafter retain possession of the material, asserting title thereto as owner thereof, and sells the same to another person, he necessarily waives or abandons any lien he might otherwise have been entitled to under the notice previously filed. He cannot secure a lien for material of which he is at the time the owner. He cannot maintain a lien for material which he afterwards sells, as owner, to others.

Under the terms of the agreement entered into between appellees and appellant on the 4th of May, 1890, the appellees were required to furnish the material and perform the labor necessary for the repair of the hotel, as specified in the written proposition, for \$589.00, which appellant agreed to pay in installments. On the 20th of June appellees had said material, with fittings and connections, in their shops in Logansport, of the value of \$435.00, ready to set up in the hotel, in pursuance of the terms of the contract. It is true that none of the material had been at the time used in the hotel, but the work having been manufactured especially for use in the hotel, could not, except by expensive changes and work, be used elsewhere, and the only reason for not putting said material in place in the building was the refusal of appellant to allow appellees to so complete said work.

Counsel for appellees have made a strong argument in support of the proposition that after the material has been prepared by the contractor for use in the building the owner should not be allowed, under the circumstances of this case, to violate his contract and defeat the lien by refusing to permit the work to be placed in position in the building. *Charnley v. Honig*, 74 Wis. 165, 42 N. W. 220; *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377; *Kelly v. Rowane*, 33 Mo. App. 440;

Houes v. Reliance Wire-Works Co., 46 Minn. 44, 48 N. W. 448.

Assuming without deciding that this position is correct and applicable to the facts as they existed on the 20th of June, 1890, the material question we will consider is, whether, under the circumstances, the appellees, in this action, can hold appellant, and his interest in the real estate, if any, liable for the value of the material with fittings and connections, afterwards used by them in the repair of the hotel. *Redmond v. Smock*, 28 Ind. 365.

On the 20th of June, 1890, appellant sold and conveyed the real estate in question to Emily J. Clark, who immediately entered into the possession of the premises.

Instead of relying on their rights against appellant, whatever they may have been, either under the lien or for breach of contract, the appellees, on the 29th of July, 1890, entered into a written agreement with Emily J. Clark and her husband, by the terms of which they sold to said Clarks the material and agreed to perform the work, previously ordered by appellant, for \$555.00, payable in installments. Appellant was no party to this contract. It expressly provided therein that said sum of \$555.00 for said material and work should be paid to appellees by Emily J. Clark and Len. J. Clark.

Prior to making the contract with Clarks, the appellees had ordered the material for the performance of the contract with appellant, and had adjusted and fitted the same for use in the hotel, but they retained possession of said material, and none of it had been delivered to appellant, nor had any work been done on the hotel in performance of said contract. There is nothing in the finding to indicate that any effort was

made by appellees after the 20th of June to carry out the contract entered into by appellant. No offer is shown to have been made by appellees to Clarks to complete the work under that contract. The strongest circumstance in favor of appellees' position is that the contract entered into between appellees and Clarks had reference to the betterment and improvement of the hotel by placing therein valuable and necessary appurtenances which were intended to become a part of the freehold. It is true that the material used is the same as that purchased and prepared by appellees under the contract with appellant, but the contract entered into between appellees and Clarks is not consistent, under the circumstances, with the theory that the work was performed or the material furnished in compliance with the original agreement between appellees and appellant.

The action proceeds upon the theory of the performance of the contract entered into between appellees and appellant, and that appellees are entitled to a personal judgment against appellant for the contract price of \$589.00 and foreclosure of the mechanic's lien, notwithstanding the undisputed fact is that the repairs were made—that is to say, the materials were actually furnished and the work was performed—under the contract with Clarks for the agreed price of \$555.00. The court finds in clear and express terms that the material was furnished and the work done “under their said contract with Clarks.”

It is conceded that appellees furnished the material and performed the work only once, and that the lien, if one exists, was created under the contract with appellant.

Counsel for appellees contend that in pursuance of the request of appellant, and with the intention of preserving their lien, they entered into the agreement to

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use, in the repair of the hotel, the material ordered by appellant, and that their agreement with Clarks was supplemental to and consistent with the agreement between them and appellant.

The contract with Clarks does not purport to be in addition to, or explanation of, the agreement with appellant. It is a new and independent contract, complete in itself. It is not consistent with the theory that the title to the material and work therein referred to, or any part thereof, was in appellant. The parties who are to pay for the repairs are different. The agreed price is changed. The time of payment is not the same. The repairs to be made and the work and material to be used therein are more specifically and minutely described in the new contract. The former contract is merely alluded to for the purpose of identifying the material to be furnished. The only reference to the lien is that it is to be released when Clarks pay the contract price. There is no stipulation or provision that the lien shall continue in force, or that it shall embrace the material to be furnished or the work to be performed under the agreement with Clarks. For aught that appears in the contract the only purpose in referring to the lien was to remove from the record an apparent cloud on the title.

It clearly appears that appellant repudiated the contract on the 20th of June, and that he refused to accept the work or to allow it to be set up in the hotel. His request is made in this connection and indicates that nothing further was to be done in compliance with the contract between him and appellees.

We assume, for the purpose of this decision, that appellant had no right to recede from the contract made between him and the appellees; that he should not then have been permitted to say that the material had not been furnished or labor performed; and that

they then had the right to stand upon their contract and enforce the lien filed by them to the extent that they had then so furnished said material and performed said work, or that they might, at their election have retained the material, or sold the same for the best price they could obtain therefor, and maintained an action against appellant for damages sustained by them on account of the breach of the contract. The appellees, however, had the right to treat the contract with appellant as abandoned or rescinded. Parsons on Contracts (8th ed.), 793.

It does not seem to have been contemplated by appellees and Clarks, when the agreement between them was made, that the original agreement between appellees and appellant should "remain in force in all its terms and conditions." *Cooke v. Murphy*, 70 Ill. 96. On the contrary, appellees appear to have considered that the enforcement of the lien filed on the 20th of June for the value of the materials prepared and work performed prior to that time, or a recovery for damages occasioned by appellant's breach of the contract, was of less advantage to them than the new agreement with Clarks. *Bishop v. Busse*, 69 Ill. 403. Whether they are entitled, in a proper action, to recover the difference in the price fixed in the two contracts on account of appellant's breach of the contract with him, is a question not before us. The change in the parties, the new contractual relation created, and the terms of the contract are such as to negative the idea that it was regarded merely as a supplement or addition to the original agreement. *Conklin v. Tuttle*, 52 Mich. 630, 18 N. W. 391.

If the acts of appellees subsequent to June 20, 1890, should be regarded as an election by them to treat the contract with appellant as abandoned or rescinded, this action cannot be maintained thereon. *Hill v.*

Green, 4 Pick. 114. In our opinion the new agreement by legitimate implication disposes of any right of action against appellant on the theory of the performance of the original agreement between him and appellees. *Coyner v. Lynde*, 10 Ind. 282. See, also, *Dotson v. Bailey*, 76 Ind. 434; *Gwynne v. Ramsey*, 92 Ind. 414; *Rollins v. Marsh*, 128 Mass. 116; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284.

There was no intention, so far as appears in the finding, that the lien filed on the 20th of June should embrace the materials furnished and the work performed under the contract of July 29. The mere fact that appellees and Clarks did not intend thereby to waive the lien cannot give such vitality to it as would be inconsistent with the contracts and acts of the parties.

The acts of appellee subsequent to June 20, are, as we have seen, inconsistent with the theory that the title to the material and work in question had then vested in appellant. The fact that the possession of such material and work then remained in appellees, and that they afterwards asserted title thereto as their own by selling the same to Clarks, precludes the idea that any lien was acquired by the notice filed on the 20th of June. Of course, if the material had not then been furnished to appellant, or the labor performed for them, no lien was acquired for material afterwards furnished and used in the building or for labor performed thereon. The lien can only be acquired by filing the notice after the material has been furnished or the labor performed. A lien cannot be acquired by intention, implication, inference, or contract. It can only be acquired by giving the notice prescribed by the statute *after* the labor has been performed or material furnished. Whether the lien can

be acquired before the completion of his contract by the materialman, for material furnished or work performed in part compliance therewith by him before giving the notice, we do not determine.

It may be conceded that if appellees had filed notice of their intention to hold a lien under the contract with Clarks, appellant would not have been in position in a proper action, under the circumstances disclosed in the finding to defeat it. Or if they had elected to stand on their rights as they existed on the 20th of June, 1890, the writer is inclined to the opinion that appellant would not be in a position to dispute their lien to the extent of \$435.00, on the theory that as matters then stood, constructively, the material had been furnished and the labor performed. Or if the work had afterwards been completed by them in compliance with the contract between appellees and appellant, it may be conceded that the lien which they attempted to acquire by the notice filed on the 20th of June could have been enforced in this action. But the lien, if any, acquired by them under the contract with appellant, having afterwards been voluntarily abandoned or waived by their act in entering into a new and independent contract with Clarks, inconsistent with the contract with appellant, for furnishing the material and performing the work in making the improvement in question, and the material having in fact been furnished and the work performed under such contract, the appellees are not, in our opinion, in a position under the circumstances of this case, for reasons hereinbefore stated, to assert or enforce against appellant in this action the lien filed on the 20th of June, 1890.

The fact that appellant has since recovered the real estate creates no liability against him in this action. As we have seen, the lien attempted to be acquired by

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appellees on the 20th of June, under the May contract with appellant, has been waived or abandoned. No notice was filed and no lien was acquired under the July contract with Clarks. Therefore, when this action was commenced appellees had no lien on the real estate for the material furnished and used in making said improvements or for labor performed thereon.

Judgment reversed, with instructions to restate conclusions of law in favor of appellant.

ROSS, J., absent.

On PETITION FOR REHEARING.

DAVIS, J.—Counsel for appellees, on petition for rehearing, have earnestly and ably argued the question involved in this appeal. On the theory that the material had been prepared and constructively furnished for improvement of the hotel property prior to the 20th of June, we may assume that appellees were then in position to enforce the lien for \$435.00 against the appellant and the property. In other words, appellant was liable for the material so furnished and the amount was secured by the lien. This is on the theory that appellees had parted with the title to the material. They certainly could not retain the title to the material and enforce the lien therefor against Barnett and his property at the same time. In other words, if they owned the material after the 20th of June, then it is evident that the material had not, prior thereto, been, in fact, furnished by them in making the improvement.

Their right of action on the lien filed on June 20, was waived and lost by subsequently asserting title to the material and selling the same to Clarks. In other words, appellees cannot now maintain and enforce the lien filed on June 20, for material which they afterward sold to Clarks, although it was subsequently

used in making the improvement. If they had filed a lien after they furnished the material for the improvement, they could have enforced it against Barnett and the property. In other words, after furnishing said material no notice of an intention to hold a lien on the property was filed. The effort, however, in this action is to enforce a lien filed on June 20, for material afterwards sold and furnished by appellees to Clarks, and subsequently used in the improvement of the hotel property.

The material must be furnished either actually or constructively for use in the improvement before the lien can be acquired. The lien can only be acquired by filing the notice as provided in the statute. It is true the material was furnished by appellees for the improvement, and that it was in fact used in the improvement of the hotel property, but it was so furnished and used after the lien sought to be enforced in this action was filed.

The fact that Barnett repudiated his contract with appellees, and that he at all times was the equitable owner of the property, and that appellees furnished the material used in making the improvement, did not create the lien. The lien is a creature of the statute, and can only be created by filing the notice after the material is furnished. In this case, it clearly appears that after the lien was filed on June 20, the appellees retained the actual possession of the material and that they subsequently sold it to Clarks, and that after they furnished and used the material in making the improvement, they filed no notice of their intention to hold the lien.

Notwithstanding Barnett accounted to Clarks for the improvement made by appellees during the time Clarks were in possession of the property, the appellees were entitled to "the fruits of their toil and in-

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dustry," but the court has no power to create a lien in their favor for the purpose of securing this result.

Their misfortune arises out of the failure to file the proper notice "within sixty days after performing such labor or furnishing such material." In other words, appellees waived any rights in their favor arising out of the constructive furnishing of the material to Barnett prior to June 20, by afterwards in fact selling such material to Clarks for a different price. The fact that Barnett unjustly repudiated his contract with appellees, and that he "requested plaintiffs to see the persons to whom he had sold said hotel about the same," did not, in the absence of the statutory notice, create a lien against him or the hotel property for the material subsequently furnished and used by them in making the improvement. It clearly appears, in the same connection, that, immediately before the request was made, "plaintiffs tendered said Barnett said urinals, closets, and other work, and offered to set them up and complete them in said hotel in accordance with said contract, but Barnett refused to accept said offer or to allow said work to be done."

Assuming that this act of Barnett's was wrong and unjust, the undisputed fact remains that appellees afterwards furnished the material in making the improvement, and we know of no principle of law under which they can now enforce against Barnett and the hotel property the lien filed on June 20, for material afterwards sold by them to Clarks and subsequently used in making such improvement. If appellees had, after the 20th of June, treated the material as belonging to Barnett, or as having been furnished for the improvement under the contract with him, a different question would be presented; but on the contrary, they afterwards retained possession of the material, assumed to be the owners thereof, and sold the same

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for a different price to Clarks, and, after furnishing and using the same in making the improvement failed to file any notice of an intention to hold a lien therefor.

The petition for rehearing is overruled.

ARNOLD, ADMINISTRATOR, v. RIFNER.

[No. 1,940. Filed December 15, 1896.]

HUSBAND AND WIFE.—*Earnings of Wife.*—*Statute Construed.*—A married woman is, under section 6975, Burns' R. S. 1894 (5130, R. S. 1881), entitled to all of her earnings accruing from any services rendered by her for persons other than her husband or her family.

From the Henry Circuit Court. *Affirmed.*

Charles N. Mikles, James Brown and William A. Brown, for appellant.

M. E. Forkner and W. O. Barnard, for appellee.

Ross, J.—The appellee filed in the office of the clerk of Henry county a claim against the estate of William Rifner, of which appellant is administrator *de bonis non*, for services rendered in nursing and caring for the decedent in his lifetime. The claim not having been allowed was transferred to the issue docket, and a trial had before a jury, resulting in a verdict in her favor for \$1,084.00.

The questions urged on this appeal arise on the ruling of the court in overruling the appellant's motion for a new trial.

It is very earnestly insisted that the verdict of the jury is not sustained by sufficient evidence; that there is no evidence upon which appellee's claim can rest; that, even if she did render the services claimed, she

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had no right of action, inasmuch as she was a married woman at the time she rendered the alleged services.

Section 6975, Burns' R. S. 1894 (5130, R. S. 1881), provides that "A married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings and profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property."

Prior to the enactment of this statute, the common law was in force in this State, and the earnings of a wife belonged to her husband. *Baxter v. Prickett's Admr.*, 27 Ind. 490; *Jenkins, Assignee, v. Flinn*, 37 Ind. 349. By this statute, however, the earnings and profits of a married woman belong to her. The appellant insists that it is not the earnings of all of her labor except that rendered for her family that is hers, but that it is only the earnings and profits resulting from her labor in carrying on a trade or business that the statute makes her property. We cannot concur in this contention. The statute specially gives to a married woman, not only the earnings and profits accruing from any trade or business carried on by her, whether the result of her own labors or not, but it also makes her the owner of her earnings when she performs services for persons other than her husband or her family. The statute does not relieve the wife from the performance of any of the duties owing to her husband or family, but it simply vests in her the ownership to the earnings resulting from her services to others.

The services claimed to have been rendered by the appellee, for which she filed the claim in controversy, were not such as were owing from her, to either her husband or her family, and were not rendered for their

comfort, welfare, or benefit. They were rendered to a stranger to whom she owed no such duty. If the services were rendered by the appellee there can be no doubt but that she is the proper person to receive pay therefor.

Counsel very earnestly attack the verdict of the jury, insisting that the evidence discloses not only that the appellee and her relatives (who they say were her witnesses) are attempting to defraud this estate, but that appellee has failed to prove that she rendered the services. We have read the evidence with more than ordinary care, and are convinced that the evidence introduced on the part of the appellee fully sustains her claim. In fact, if the decedent was as helpless and as much of a care as many of the witnesses testify he was, the appellee not only assumed grave responsibilities and risks, but rendered very onerous and unpleasant services for him. Such services, when rendered for a stranger, are much more unpleasant and distasteful than when rendered for one's own family, and this probably accounts for the value placed by the witnesses on such services. True, in many respects the testimony of the witnesses for the appellant might be, when submitted to a jury, sufficient to discredit that given in favor of the appellee; but the testimony of all the witnesses may be true, and yet the appellee be entitled to recover. If we gather correctly the testimony of the appellant's witnesses, none of them denied the facts testified about by the appellee's witnesses. They simply testified from their knowledge and observation. None of them testified that the decedent did not do as appellee's witnesses testified, or that appellee did not render the services, but simply testified that from their observation the decedent was not in the condition that appellee's witnesses testified he was.

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The instructions given by the court, of which the appellant complains, were proper in view of the statute above referred to, which gives to the wife the ownership of all her earnings accruing from any services rendered by her for persons other than her husband or her family.

We find no error for which the judgment of the court below should be reversed.

Judgment affirmed.

THE INDIANA CANNING COMPANY v. PRIEST.

[No. 2,072. Filed December 15, 1896.]

CONTRACT.—Breach of.—Measure of Damages.—The measure of damages for failure to carry out a contract of purchase of all tomatoes plaintiff should raise on a certain tract of land, is such contract price, less the cost of gathering and delivering the tomatoes, where it is shown that there was no other market for the tomatoes; and where there is no evidence as to the cost of gathering and delivering the tomatoes or as to their value in the field, only nominal damages can be recovered.

From the Vanderburgh Superior Court. *Reversed.*

Alexander Gilchrist and Curran A. DeBruler, for appellant.

G. K. Denton, H. A. Mattison, Frank B. Posey and D. Q. Chappell, for appellee.

GAVIN, J.—Appellee recovered damages for appellant's refusal to carry out its contract whereby it had agreed to purchase from him all the tomatoes he should raise upon a certain tract of land, delivery to be made by appellee at the appellant's factory.

Appellee's evidence showed that up to September 12, he fulfilled his part of the contract by delivering the tomatoes then ripened, and that he was ready and willing to perform it in full by delivering 1,200

bushels more of the grade and quality called for by the contract, but upon that day appellant notified him it would receive no more from him, wherefore no further effort to deliver was made, but the tomatoes were permitted to rot in the field.

It is conceded by appellee that the title to the tomatoes, not delivered, never passed to appellant, and that appellee was not entitled to recover the contract price as and for a completed sale, but could only claim such damages as he sustained by the refusal to receive any more tomatoes. *Ridgley v. Mooney*, ante, 362; *Shipp v. Atkinson*, 8 Ind. App. 505.

An examination of these cases and the authorities therein cited will disclose that it is incumbent upon him who claims such damages to present to the court such data as are necessary to enable the court or jury to properly determine the amount of damages actually sustained. This the appellee did not do.

Assuming that he did prove that there was no available market for the tomatoes, and that he was thereby justified in allowing them to rot upon the ground, still, before appellee's damages could be ascertained it was essential that he should prove the cost of picking and delivering them. They were raised six or seven miles from the factory. If the tomatoes were worthless, then the most which he could ask would be the contract price less the cost of performing it. Had he proceeded to gather and tender, at the place of delivery, then, he might have maintained his action for the full contract price; but not having done this he ought not to recover as though he had so done. There was no evidence whatever as to the cost of gathering and delivering the tomatoes, nor as to the value of the tomatoes in the field. It is true, the jury deducted 10 cents per bushel from what would otherwise be the contract price, possibly intending this as an allowance

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for such expense, but there is not a particle of evidence to enable us to determine whether or not this was the correct amount. The evidence is therefore insufficient to establish appellee's claim to more than nominal damages.

Judgment reversed, with instructions to sustain the motion for a new trial.

TREMAIN, ADMINISTRATOR, v. SEVERIN ET AL.

[No. 2,086. Filed December 16, 1896.]

BILLS AND NOTES.—Principal and Surety.—Decedent's Estates.—Statute Construed.—Under the provisions of section 2468, Burns' R. S. 1894, that "if a decedent be a surety only in any joint, or joint and several contract or in any judgment founded thereon, his estate shall not be liable for the payment thereof, unless it be shown that the principal is a nonresident of this State or is insolvent," etc., proof that principal was insolvent at the time of the trial is sufficient to justify a judgment against a decedent's estate on a claim filed against the estate wherein decedent was surety on a promissory note which was the basis of such claim, without showing that payee used due diligence in prosecuting the principal to insolvency, where no notice was given by surety to proceed against principal.

EVIDENCE.—Admissibility of, in an Action on Claim Against a Decedent's Estate.—Agency.—Statute Construed.—The signing of the name of a surety to a note, at the latter's request, and in his presence by one of the makers, does not constitute such maker an agent and render him incompetent to testify to such fact after the death of surety, in an action against his estate on such note under section 508, Burns' R. S. 1894, providing that "No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness, in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent."

From the Decatur Circuit Court. *Affirmed.*

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James K. Ewing, and John D. Wallingford, for appellant.

Herod & Herod, for appellees.

REINHARD, J.—This action was brought in the nature of a claim filed by the appellees against the estate of the appellant's decedent, on a promissory note. The cause was tried by the court, and there was a finding and judgment in favor of appellees, and an allowance for the entire amount of the claim.

It is insisted that the evidence fails to support the verdict. The evidence shows that the note was executed by the decedent, Charles Anderson, as surety for John Swartz and Samuel Swartz. There was no proof that any suit was ever instituted against the principals or either of them, and no excuse is shown for this omission, except that evidence was introduced tending to show that at the time of the trial both the principals were insolvent. No evidence was offered to show what the financial condition of the principal debtors was at the time of the maturity of the note or thereafter until the time of the trial. The note fell due in December, 1895.

It is the contention of appellant's counsel that the failure of proof of the diligent prosecution of the note entitled the appellant to a finding and judgment in his favor, for the reason that the failure to so prosecute operated to discharge the appellant. This contention is founded upon the provision of the section of the statute which reads as follows: "If the decedent be a surety only in any joint, or joint and several contract, or in any judgment founded thereon, his estate shall not be liable for the payment thereof, unless it be shown that the principal is a nonresident of this State or is insolvent: *Provided, That,* although the principal be a resident of this State and his solvency be not

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proved, nevertheless the claim may be allowed against the estate provisionally, to be paid on subsequent proof of the diligent prosecution of the principal to insolvency, or that such prosecution would not have availed. The final settlement of the estate shall not be delayed by reason of such allowance, but an amount of money sufficient to discharge the claim, or its *pro rata* where in case the estate be insolvent, may be paid into court for that purpose. After notice to the creditor, and on proof that his demand has been paid, or that he has failed to diligently prosecute the principal, and that such prosecution would have availed, the court shall order the money reserved to be distributed to the heirs or legatees. The creditor may, at any time after notice to the parties interested, apply for the payment of his claim; and if it appears that he has diligently prosecuted the principal to insolvency, or that such prosecution would not have availed, the court shall order his claim to be paid." Section 2468, Burns' R. S. 1894 (2313, Horner's R. S. 1896).

Whether or not this contention of appellant's counsel can be upheld must depend, of course, upon the proper construction of the statute. In the case before us the contingency upon which the estate is primarily exempt from liability has arisen, unless the facts bring it within the scope of one of the exceptions named. The decedent was a surety upon a joint or joint and several contract. His estate is, therefore, not liable unless the principals are nonresidents of the State, or insolvent. It was shown that the principals are insolvent. The estate is, therefore, liable. When the insolvency has been duly established, the latter portion of the section quoted, *i. e.*, that portion which follows and is contained in the proviso, cannot be ap-

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plicable, for the sufficient reason that no such case as is contemplated by such proviso has arisen. The case supposed is one in which the insolvency has not been proved. In that case the claimant has yet another remedy. He may have the claim allowed provisionally, to be paid only in the event that he prosecute the principal to insolvency after the allowance, or show that such prosecution would be of no avail. When the fact of the insolvency of the principal is established in the first instance, such fact, in itself, renders the estate liable without reference to what may take place thereafter. In the case at bar the insolvency was shown to the satisfaction of the court trying the cause. This was sufficient to defeat the immunity from liability which would otherwise have been available to the estate. The principals were shown to be insolvent and, therefore, the estate is liable, notwithstanding the decedent was a surety.

This general proposition is admitted by the appellant's counsel, if we correctly interpret their brief, but they further insist that the insolvency spoken of in the statute has reference, not to the time of the trial, but to the time of the maturity of the note, and thenceforth to the day of trial. If the principal was insolvent during all this time, then they concede that the estate would be liable, notwithstanding the fact that the decedent was only surety. The only other alternative counsel claim, upon which the estate may be held liable, is that the claimant must show that he used due diligence against the principal debtor. By "due diligence" counsel mean, as they inform us, that suit must be brought by the holder of the note at the next term of court after the maturity of the note. In other words, their contention is, that insolvency, at the time suit is brought, or at the time of trial, does not raise any presumption of insolvency prior to the time

when suit was instituted, and that it follows conclusively, therefore, that in the present case due diligence was not used.

It is true that suit might have been instituted upon the note as early as February, 1895. Whether the decedent was then living or not is not shown.

It is also true that insolvency at the time of the trial does not necessarily establish insolvency at the time of the maturity of the note. But it was not necessary to prove insolvency in the present case at the time the note matured, and from that time until suit was brought. Nor was it incumbent on the appellees to prove that the principal debtors were prosecuted to insolvency, or that due diligence was used in that behalf as soon as the note matured. This is not a transaction between the holder and indorser of a note, nor is it the case of the payee of a note against a surety thereon who has given notice to such payee to proceed against the principal. Sections 1224, 1225, Burns' R. S. 1894 (1210, 1211, Horner's R. S. 1896).

Ordinarily, a surety on a note is not exempt from liability by reason of the fact that the holder of such note has failed to prosecute the principal to insolvency within a reasonable time after the instrument fell due. Sureties, as well as principals, are liable thereon as long as the action is not barred by the statute of limitations. If the surety desires suit to be instituted against the principal debtor, he must give notice to the holder as required by the statute last cited. It is not claimed that such notice was given in the present case. The statute under which the appellant claims immunity from liability contains no provision whatever which requires the holder of the note to proceed against the principal as soon as the note matures, or within a reasonable time thereafter. All it requires at the hands of the payee or holder is,

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to show that the principal is insolvent, *i. e.*, insolvent at the time of the suit. There could be no reason for giving the statute the construction for which the appellant contends. The consequences of such a construction would be that in every case where a note upon which there is a surety had been running for a considerable time after its maturity, and the surety should die, the failure of the holder to bring suit immediately after maturity would discharge the estate of the surety, unless it be shown that the principal was insolvent during all the time between the maturity of the note and the filing thereof against the estate. The surety might have had ample time and opportunity during his life to notify the holder to sue, as the statute requires, and yet he might have failed to do so, and this failure would constitute no excuse to the holder of the note for his own failure to prosecute such an action. In all such cases it would be impossible to enforce the collection of the note after the surety's death, while if the surety were alive, he would be clearly liable. Such results as these, which would inevitably follow such construction, were never intended by the legislature in the enactment of the statute relied upon, and such a construction would, in our opinion, be utterly unwarranted. The obvious purpose of the statute was to compel the holders of such claims as this against estates of deceased sureties to first exhaust the property of the principal debtor before recourse is had against the estate of the decedent. If the principal is at the time insolvent it would be an idle ceremony to proceed against him, for nothing could be accomplished thereby except the making of unnecessary costs. We, therefore, think that the claimants had done all they were required to do to entitle them to judgment against the estate of

the surety when they proved the insolvency of the principal.

Appellant's counsel further insist that the court committed reversible error by overruling his objection to the testimony of John Swartz, a witness for the appellees. Counsel say that the objection was made to his competency under section 508, Burns' R. S. 1894, which provides, *inter alia*, that "No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness, in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent."

If the witness John Swartz was really an agent of the decedent in the sense in which the word is used in the statute, he was not a competent witness. If, on the other hand, he was not such an agent, his testimony was properly received.

The note was given to Severin, Ostermyer & Co., for a bill of groceries purchased of them by the firm of Samuel Swartz & Son. The note was signed by Samuel Swartz and John Swartz, the members of said firm, as principals, and the appellant's decedent as surety. John Swartz, the junior member of the firm, was the witness whose testimony was objected to. He testified that he requested the decedent to sign the note for him as surety to which the decedent assented and asked Swartz to write his, decedent's, name to the note, which was accordingly done, the decedent making his mark, to the signature in the presence of Swartz. This is the sum total of the evidence upon the subject of agency. It is our opinion that Swartz was not incompetent as a witness from the fact that he was an agent in the making or continuing of the

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contract. The fact that Swartz wrote the decedent's name at his request and in his presence, did not make him such an agent as the statute contemplates. He was at most but an amanuensis,—mere instrument by which the decedent accomplished the purpose of signing the note,—a mere instrument, like a stamp, or a pen. If the signature had been placed to the note by the witness at a time when appellant's decedent was not present, there might be some reason for the contention that Swartz was an agent.

Moreover, it is, to say the least, a question of doubt whether the agent spoken of in the statute must not have been the agent of the opposite party, rather than the agent of the deceased person. The object of the statute doubtless was to prevent the living party from having an advantage over the dead person or his property. Death has sealed the lips of the deceased, and the law aims to close the lips of the living party. If the agent of the living party were allowed to testify against the estate of the decedent as to matters occurring during the life of the deceased, the purpose of the statute would in many cases be defeated. Was it not also the purpose of this statute to prevent the agent of the living party from testifying as to matters that occurred in the decedent's lifetime?

Judgment affirmed.

METZGER v. SCHULTZ, BY NEXT FRIEND.

[No. 1,776. Filed April 22, 1896. Rehearing denied Dec. 16, 1896.]

NEGLIGENCE.—Gas Explosion.—Defective Gas Pipes.—Knowledge of Owner.—A landlord is not liable for an injury to an employe of her tenant resulting from an explosion of gas, caused by defective plumbing done by a former tenant of the building, who employed a competent plumber to do the work, in which the defects were not apparent and of which the landlord had no actual knowledge.

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EVIDENCE.—Presumption.—Where the undisputed testimony showed that a gas pipe was properly supported by chain or wires suspended from the joist of the building, evidence, after an explosion of such gas pipe, that no chain or wire was found, does not overcome the presumption that such pipe was properly supported at the time it was placed in the building.

From the Marion Superior Court. *Reversed.*

Lucius B. Swift, for appellant.

Vinson Carter and *William T. Brown*, for appellee.

LOTZ, J.—This action was instituted by the appellee against the appellant and one Henry C. Pomeroy. The defendants filed separate demurrers to the amended complaint and Pomeroy's demurrer was sustained and a judgment was rendered in his favor for costs. The appellant answered by general denial, and the trial resulted in a verdict of \$1,000.00 for the appellee, for which judgment was rendered in his favor, after appellant's motion for judgment upon answers to interrogatories and her motion for a new trial had been overruled. The appellant appeals to this court and asks a reversal upon several errors assigned.

The amended complaint alleges that October 1, 1887, Alexander Metzger, the husband of the appellant, owned certain real estate in Indianapolis, upon the southwest corner of Pennsylvania and North streets, upon which was a two-story brick building with a cellar, leased and occupied by the defendant, Pomeroy, for a drug store. That immediately west of and adjoining said drug store was another brick building, with a cellar. That the two cellars were separated by a brick wall, with no communication between them. That on said day Pomeroy did some gas fitting in the drug store cellar, and did it negligently. That the pipes were old, rusty, defective, and improperly constructed. That no elbows were used, but that when

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a turn was to be made the pipes were bent, causing a constant, severe, and unusual strain, and the pipes were loosely fastened to joists.

That Alexander Metzger died August 4, 1892, devising said real estate to his wife, the appellant. That afterwards Pomeroy surrendered the drug store premises, including said pipes to the appellant. That the appellant with full knowledge of the defective condition of the pipes maintained the same in such condition, and on September 1, 1892, leased said drug store premises, including said fixtures, to Thomas C. Potter, and until September 21, 1893, with full knowledge of said defective condition, received rent for said premises.

That on September 21, 1893, said second building immediately west of said drug store was leased to Jones and Berry as tenants of the appellant, for a grocery, and the appellee was employed by said firm.

That by reason of said defective gas fitting, the pipes in the drug store cellar cracked and broke so that the gas escaped and diffused itself through said cellars and buildings, and especially in said drug store cellar.

That on said day, September 21, 1893, said gas, escaping as aforesaid, exploded in said drug store cellar while the appellee was engaged in his usual duties in said grocery and cellar adjoining said drug store, and hurled the appellee down, and caused large quantities of brick and mortar from said cellar wall to fall upon him, injuring him externally and internally, and burning him.

The undisputed evidence in this case shows that in 1887 one Alexander Metzger was the owner of the real estate described in the complaint. The ground floor of the building was divided into two rooms and the cellar into three rooms. Alexander Metzger demised the east room and cellar to one Henry C. Pomeroy for a

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drug store. While Pomeroy was in possession he voluntarily and of his own accord caused a gas pipe to be connected on the north side of the cellar with the Consumers' Gas Trust Company's main, for the purpose of lighting the drug store by natural gas. He employed a plumber and gasfitter for this purpose. A brass stop cock was put in the pipe near the wall where the connection was made. This pipe was necessarily many feet in length in order to reach from the connection to the point where it rose to conduct the gas into the drug store, and it was deflected or sprung from a straight line. Alexander Metzger died August 4, 1892, and devised the real estate to his wife, the appellant. Afterwards Pomeroy sold his drug business to one Thomas C. Potter and gave him the immediate possession of that part of the premises leased by him. Potter continued in possession and paid rent to appellant's agents for several months. On the 18th day of August, 1892, the appellant demised the drug store premises to Potter for the period of three years. On September 21, 1893, the west end of the building including the cellar thereunder, was leased to Jones and Berry for the purposes of a grocery store, and they were engaged in conducting that business therein. The appellee was in their employ as a clerk, and descended into the cellar under the grocery store, when an explosion occurred and he was badly burned. There were two explosions in rapid succession. One of the explosions partly demolished one of the partition walls of the cellar and large quantities of brick and mortar were hurled in the direction of the gas pipe. After the explosion the gas pipe was found broken off at the brass stop cock. The appellant at no time before the explosion had any actual knowledge of the condition of the gas pipe.

Appellant's contention is, that as she came into the

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possession of the property, with all the existing conditions, and that as she had no actual knowledge of any defect in the pipe, she is not chargeable with negligence in keeping the premises in a reasonably safe condition, and, therefore, not responsible for the injuries to the appellee.

This presents one of the principal questions involved in this controversy.

The general rule is that every person must so use his own property as not to injure others. Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights is an actionable nuisance. Cooley Torts, section 565. A nuisance may result from the negligent acts of commission or omission. It is also the general rule that the occupier of lands is *prima facie* responsible for any nuisance maintained thereon and not the owner. But to this rule there are several well defined exceptions. The owner is responsible if he creates a nuisance and maintains it. He is responsible if he creates a nuisance and then demises the premises with the nuisance thereon, although he is out of possession. He is liable if a nuisance was erected on the land by a prior owner or by a stranger, and he knowingly maintains or continues it. He is liable if he demised the premises and covenanted to keep them in repair, and omits to repair, thereby creating a nuisance. He is liable if he demise the premises to be used as a nuisance, or to be used in any way so that a nuisance will necessarily be created. But a grantee or devisee of lands upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has notice of its existence; and in a certain class of cases, until he has been requested to abate the same. *Penruddock's Case*, 3 Coke, Part 5, p. 101, is one of the earliest cases bearing on these questions.

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It was there decided that an action will lie against one who erects a nuisance without any request to abate it; but not against the feoffee, unless he does not remove the nuisance after request. This case has been generally followed by the English and American courts. The first rule announced in that case is a reasonable one. If the owner create a nuisance, knowledge of its existence is necessarily involved in the act. If he suffer or permit the premises to become out of repair while he is the occupant, so that a nuisance results, the law implies notice. The second rule has been generally applied to the obstructions of private ways, ancient lights, the diversion of waters and watercourses by dams, embankments, etc. This rule, when applied to such cases, is also a very reasonable one, because otherwise the grantee or devisee of the property on which the nuisance exists might be subjected to great loss on account of conditions of which he was ignorant, and damages which he never intended to occasion. Often such conditions cannot be easily known except to the party injured, and so long as he rests in silence and does not make any complaint, the new owner or occupant has the right to presume that the structures and appliances thereon were rightfully erected, and he is not bound to know or suspect that before he became the owner, one party committed a wrong and the other submitted to it. The case of *Ahren v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, whilst differing widely in its facts from the case at bar, is a very instructive case, and the authorities bearing upon the above propositions are reviewed at great length in the able prevailing and dissenting opinions.

In the case at bar, neither the appellant nor her devisor covenanted with the tenants to erect new structures or make repairs. In the absence of such

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covenants it was the duty of the tenant to keep the premises in proper repair, and if he erected new structures or put in new appliances for his own accommodation, he alone was liable for the consequences. If the tenant, Pomeroy, had remained in possession up to the time of the explosion, it is apparent that appellant would not have been liable. When the landlord has not covenanted to make repairs he has no right to enter upon the premises. The exclusive right is in the tenant. Does the fact that Pomeroy sold his business to Potter, who went into immediate possession and became the tenant of appellant change her responsibility? If Potter's tenancy was but a continuation of Pomeroy's, then the appellant is not liable; but it was not a continuation. A new tenancy was created. She demised the premises to Potter in their existing condition with the defective pipe. Under the rule above announced she was responsible for the nuisance existing thereon, if she knew that there was a nuisance. Appellant's counsel insists, that as but an instant elapsed between the tenancy of Pomeroy and that of Potter, that she could not have had notice of the nuisance.

It is true that she had no actual notice, but she had it in her power to have ascertained the existing conditions before accepting Potter as a tenant. If she had the power, and failed to exercise it, she will be bound as if she had notice. If a landlord demise his property, the law requires him to know its condition at the time he accepts a tenant. The rights of others are frequently involved by the condition in which the premises are maintained. Any person who conducts upon his premises any dangerous business, or has thereon any dangerous machinery or substance, not in themselves unlawful, is in duty bound to exercise reasonable care and vigilance to see that no harm

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comes to others in consequence thereof. But the landlord is not an insurer. There are many businesses, machinery, and appliances not nuisances, *per se*, that are attended with danger. When the landlord has exercised reasonable care in respect thereto, he is exonerated from liability. If, in the erection of structures and appliances, and in conducting business on his premises, he has employed and relied upon persons who are careful, prudent, and skillful, and has exercised care to keep his premises in a safe condition, he has done all that the law requires. The appellant further insists, that as a competent and skillful person was employed to do the gas fitting, she is not responsible for the injury to appellee.

There was some evidence in this case that tended to show that the gas fitting was improperly and unskillfully done; that there was a strain upon the pipe which might have caused it to break, especially at the brass stop cock. But there was no evidence that the gasfitter who did the work was unskillful or incompetent, except as that fact might be inferred from this particular work. On the other hand, the undisputed evidence shows that the gasfitter who made the connection was a plumber, steam and gasfitter of many years' experience. A skillful person may occasionally perform a piece of work in an unskillful manner. The inference that one is an unskillful person cannot be established from a particular isolated piece of work, especially when the undisputed evidence shows that he is a workman of many years' experience. If the workman were sued for his own unskillfulness, he would be compelled to answer; but when a master or landlord is sued for a liability growing out of failure to employ a competent and skillful person, it is not enough to show that the workman did a particular piece of work in an unskillful manner. Before the

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jury was warranted in concluding that the gasfitter who did the work was unskillful and incompetent there must be some evidence fairly tending to establish it. The rule is that when there is any evidence, having legal weight, bearing upon a given issue or fact, the party producing it is entitled to go to the jury thereon. If the evidence adduced is so slight and inconclusive that no rational or well constructed mind can infer from it the fact it is offered to establish, the court may direct the verdict. *Sunnyside Coal & Coke Co. v. Reitz*, 14 Ind. App. 478; *Conner v. Giles*, 76 Me. 132; Thompson Trials, sections 2246, 2249.

If Pomeroy had remained in possession until the explosion, he would not have been liable under these circumstances. He was not required to set his judgment against that of a person of technical skill. If Pomeroy, the person who had the work done, was not liable then the appellant is not liable.

It may be conceded that the appellant, when she made the demise to Potter was bound to take notice of the dangerous and explosive character of gas, artificial and natural, and to take notice of such defects as were apparent and might have been easily ascertained by a person of ordinary prudence. But there was no evidence in this case that the defect in the pipe was of such a character that a person of ordinary prudence could have ascertained it. The pipe had been in use for more than four years and had performed good service during all that time. She was not required to override the judgment of experienced plumbers and gasfitters and persons of technical skill. She was entitled to rely upon their skill and judgment. In our opinion the appellant was guilty of no actionable wrong.

The case of *Helwig v. Jordan*, 53 Ind. 21, is urged upon our attention as holding a contrary doctrine. In

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that case the nuisance existed at the time of the demise and the landlord had actual knowledge of its existence. In the case at bar, the appellant was chargeable with notice of the existing conditions, but she was not required to know that those conditions created a nuisance. In the case last cited, the landlord not only knew of the existing conditions, but he knew that they were equivalent to a nuisance. It would be a harsh rule, indeed, that would require the landlord to answer for every defect in his property. If he employs competent and skillful persons in the construction and repair of his premises, and relies upon their judgment, he has done all that should be required of a reasonable and prudent person.

In this case, Pomeroy, the first tenant, had the right to assume that the work was done in a skillful and safe manner. The law would have protected him. Appellant is in no worse condition.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ON PETITION FOR REHEARING.

LOTZ, C. J.—The appellee, in his argument in support of his petition for a rehearing, earnestly insists that we overlooked and failed to consider the point upon which he placed his chief reliance for an affirmation of the judgment, that of negligence in the manner of constructing, and failing to properly support the gas pipe. Upon this question it is contended that the evidence is conflicting, and that it was therefore a question for the jury and not one upon which this court can arbitrarily say as a matter of law, there was no negligence.

The undisputed evidence shows that a competent and skillful gasfitter was employed to do the work, and his uncontradicted testimony was that he supported

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the pipe by chain or wires, suspended from the joist of the building. It was true there was some evidence to the effect that after the explosion no evidence of such support was found. But this evidence was very meager, and related to a time after a large quantity of brick and debris had been hurled with great violence against the pipe and joist. But if it be conceded that no supports were found after the explosion, this does not tend to prove the fact that the pipe was unsupported on the day the appellant leased the premises to Potter. The undisputed testimony showed that the pipe was supported when first erected. The presumption is that it so continued until a cause arose sufficient to destroy such supports. The general rule is that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is so established by evidence, either direct or presumptive. *Smith v. New York, etc., R. R. Co.*, 43 Barb. 225; *Lawson Presumptive Evidence*, pp. 165, 176.

The burden rested upon the appellee to show that the pipe was unsafe and improperly supported on the day when Potter became the lessee. There was an entire absence of evidence on this point.

Petition overruled.

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[No. 1,731. Filed December 17, 1896.]

ABSTRACTERS OF TITLE.—Negligence.—Complaint.—Priority of Liens.

—A judgment will not be reversed for sustaining a demurrer to a complaint for damages against an abstractor of titles, wherein it is alleged that plaintiff employed such abstractor to make an abstract of title to certain real estate, and such abstractor failed and neglected to show in such abstract, a mortgage existing against such

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real estate, which was duly recorded in the recorder's office, and by reason of such failure to so note said mortgage in the abstract, plaintiff, who was the holder of a tax deed to such real estate, in an action to quiet his title thereto, did not make the holder of such mortgage a party in such action, as plaintiff's lien for taxes was superior to that of the mortgage, and his failure to make the holder of the mortgage a party did not operate as a waiver of the priority of the tax lien. *pp. 465-468.*

LIENS.—*Foreclosure of Senior Lien Without Making Junior Lienholder a Party.*—A senior lienholder may foreclose a lien without making a junior lienholder a party and still retain the priority of his lien, and the subsequent sales thereunder do not render the title of the purchaser at such sale inferior to the title acquired by another at a sale upon the decree of foreclosure of a junior lien, unless the holder of the superior lien is made a party to the foreclosure of the junior lien and fails to set up the priority of his own lien, or is barred in some way by the judgment of the court. *pp. 468, 469.*

PLEADING.—*Specific Averments Control.*—When the specific facts averred, in an action for damages, show that there could have been no damages, such specific averments will control the general allegations of damages. *p. 470.*

APPEAL AND ERROR.—*Nominal Damages.*—A judgment will not be reversed for sustaining a demurrer to a complaint for damages which at most shows that plaintiff is entitled only to nominal damages. *p. 470.*

From the Fountain Circuit Court. *Affirmed.*

G. W. Paul and *M. W. Bruner*, for appellant.

J. Frank Hanly, for appellees.

REINHARD, J.—The error complained of consists in the sustaining of the demurrer of the appellees to the complaint of the appellant. The appellees are abstracters of titles to real estate. The gist of the complaint is that the appellant employed them to make an abstract of title to certain real estate and that they negligently failed to abstract a mortgage of record in the recorder's office of Warren county, where the land is situated, and also failed to include in such abstract a suit then pending in the circuit court of said county for the foreclosure of said mortgage, and that the ap-

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pellant was damaged by the failure of appellees to properly note said incumbrance in said abstract. The abstract of title and certificate thereto, made and signed by the appellees, are set forth in the complaint.

It appears from the complaint that the appellees are professional abstracters of titles to real estate in Warren county, where they have an office and hold themselves out as skillful and experienced abstracters, to the public, for hire. In February, 1891, the appellant purchased the real estate in question at a delinquent tax sale, as the property of Joseph Hedrick. In March, 1893, more than two years after such purchase by him, the appellant received from the auditor of Warren county a tax deed for said lands, which was duly recorded. In September, 1893, appellant, desiring to bring suit to quiet his title to said lands, employed the appellees to make him an abstract of title thereto, for the purpose of ascertaining who had or held any lien of any kind upon said real estate, of record in any of the county offices of said county where such records are kept, and also *lis pendens* and suits, if any were pending, affecting such real estate, in order that he might make all proper and necessary parties to his action to quiet title on his tax deed. The appellees undertook to make and complete for him an abstract of title to said lands, from the year 1866 up to and including the 14th day of September, 1893, under said employment, but that they so negligently and carelessly performed this undertaking that in making said abstract they failed and neglected to show or mention a certain mortgage on said real estate, long before that time duly recorded in the recorder's office of said county, securing a note of \$933.12, in favor of the First National Bank of Danville, Illinois, and executed by said Hedrick, which mortgage was wholly uncanceled and unsatisfied,

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and that a suit was then and for a long time, to-wit, two months, had been pending in the circuit court of Warren county to foreclose the same; which suit was properly docketed in the office of the clerk of said court, but the appellees failed and neglected to mention said pending suit, or the existence of said mortgage in said abstract. The appellant was wholly ignorant of the existence of said mortgage and pending suit. The appellees attached to said abstract their official certificate, stating that they had examined the records of said county from the 23d day of July, 1866, to the 14th day of September, 1893, and found no transfers, mortgages, or other liens affecting the title to the real estate described and shown upon the public records of said county. Appellant paid appellees \$7.50 for making said abstract, in accordance with his contract with them. Shortly after receiving such abstract and relying upon the correctness thereof, the appellant employed attorneys and directed them to begin and prosecute an action in the proper court to quiet his title to said real estate, which they did in the Warren Circuit Court, at its October term, 1893, and because of the negligent omission of appellees to mention said mortgage, or the pending suit to foreclose the same, the appellant and his attorneys, relying upon said abstract, failed to make said First National Bank of Danville, Illinois, a party to his action to quiet title on said tax deed. Such proceedings were had in connection with his said action in said court as resulted in a foreclosure of his tax lien on the 13th day of October, 1893, for the sum of \$512.38, and costs in the decree. The court gave thirty days within which to redeem said lands, after the expiration of which, no one having redeemed the same, the lands were duly sold by the sheriff, under said decree, to one Voris, who purchased the same for appellant, who subsequently

received a sheriff's deed therefor. In the meantime, said bank foreclosed its mortgage, without the knowledge of appellant, and caused the lands to be sold on the decree of foreclosure, said bank and its lien not being cut off or barred by the foreclosure of the appellant's tax lien, because it was not made a party to appellant's suit. By reason thereof the appellant was subjected to the payment of heavy and expensive litigation, costing him in expenses and attorney's fees \$300.00, and he has been compelled to pay, in redemption and satisfaction of said bank's mortgage, in order to save and protect his title to said lands, under the purchase at the sale on the decree foreclosing the tax lien, the further sum of \$822.29; all of which became necessary by the negligence of the appellees in the making of said abstract of title, and by reason of said negligence the appellant has sustained damages in the sum of \$1,500.00. Appellant's counsel insist that the complaint shows that the appellant is entitled to substantial damages, while appellees' counsel as earnestly contends that appellant does not show himself entitled to receive more than nominal damages.

Was the appellant injured by the failure of the appellees to fulfill their contract?

When the appellant employed the appellees to prepare the abstract he had already acquired the lien upon the land. The lien being for taxes, was superior to any other lien upon the real estate. Had he made the bank a party to his foreclosure suit he could have secured a decree, as between him and the bank, establishing the priority of his lien. But his failure to make the bank a party did not operate as a waiver of his right of priority. A senior lienholder may foreclose his lien without making the junior lienholder a party and still retain the priority of his lien; or, at least, the merger of the lien into the decree, and the

subsequent sales thereunder do not render the title of the purchaser at such sale inferior to the title acquired by another at a sale upon the decree of foreclosure of a junior lien, unless the holder of the superior lien is a party to the foreclosure suit of the junior lien and fails to set up the priority of his own lien, or is barred in some way by the judgment of the court. The appellant does not aver in his complaint that he was made a party to the foreclosure suit of the bank. Of course, if he was a party thereto, he could easily have asserted and established the priority of his own lien. If he was not a party he could have lost no rights, for no decree rendered against him would have any validity. The purchaser at the sale upon the junior lien—the mortgage of the bank—acquired no title superior to that of the appellant, and could not maintain any action for the possession of the lands without first redeeming from the sale upon the superior lien. The bank, as the holder of a mortgage lien, was bound to take notice of the appellant's tax lien and the proceedings thereunder, whether made a party to such proceedings or not, and its only remedy was to redeem from the sale thereunder within the proper time. The sale under the tax lien and purchase thereat, by the appellant, passed the title to him as against the bank, subject to the right of redemption, notwithstanding the bank was not a party to the foreclosure proceedings of the tax lien. *Jenkins v. Newman*, 122 Ind. 99.

It is difficult to understand, therefore, how the appellant could have sustained any substantial damage by reason of the appellees' failure to mention the mortgage and pending suit of the bank in the abstract. It is not shown how the appellant was deprived of any rights or parted with anything of value in reliance upon the statements or omissions of the abstract. It

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is true the complaint avers that appellant was compelled to pay out money in order to protect his title and to litigate the question of priority, but there is an utter failure to show any necessity for such payments. The demurrer only admits facts that are well pleaded; it does not admit a legal conclusion. It is the specific allegations of a pleading which control and not the conclusions. A party may aver that he was injured by the wrongful acts of another, but if the specific facts averred show that there could have been no damages, he can recover none, for the specific averments always control the general allegations in such a pleading. Elliott's App. Proceed., p. 588 *Warbritton v. Demorett*, 129 Ind. 346; *Racer v. State*, 131 Ind. 393; *Moyer v. Ft. Wayne, etc., R. R. Co.*, 132 Ind. 88.

If it had been made to appear by the averments of the complaint that the appellant was compelled to pay out any money for the purpose of a suit to foreclose the right of redemption of the bank, the case might be different. But this is not made to appear.

The complaint at most shows that the appellant is entitled to nominal damages. A judgment will not be reversed for sustaining a demurrer to such a complaint.

Judgment affirmed.

PAPE v. ROMY, ADMINISTRATOR.

[No. 1,903. Filed Sept. 22, 1896. Rehearing denied Dec. 17, 1896.]

CONTRACT.—*Conditional Sale.*—*Agent's Commission.*—Securing a purchaser of an interest in a patent right for \$7,000 with the privilege, at the purchaser's option, of transferring such interest back to the owner within one year and receiving back the purchase money and interest thereon does not entitle the agent who negotiated the sale to a commission therefor, under an agreement that he was to

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have as commission all which he might receive in excess of \$5,000 for such interest, where the purchaser exercised the privilege so agreed upon and transferred the interest so purchased back to the owner and received the purchase price with interest.

From the Whitley Circuit Court. *Reversed.*

T. E. Ellison and L. M. Ninde & Sons, for appellant.

A. A. Chapin and Henry Colerick, for appellee.

DAVIS, C. J.—This was an action instituted by Wright against Pape to recover for services in negotiating purchase of patent right in 1881; in procuring purchasers for patent rights, and for commissions on sales of machines and expenses in 1882. *Pape v. Wright*, 116 Ind. 502.

After the reversal of the former judgment by the Supreme Court, appellant filed a fourth paragraph of answer averring that the matter sued for had been litigated and settled in a suit between the appellee and appellant and Fleming and Pfeiffer.

A general verdict was returned in favor of appellee for \$1,250.00.

In answer to interrogatories, the jury find that the Fleming Manufacturing Company, composed of Charles Pape, William Fleming and Charles Pfeiffer, was formed January 1, 1883, and that they allow appellee in their general verdict \$1,250.00 for services of said Wright as the employe and agent of the Fleming Manufacturing Company, and that suit was brought by Wright against Pape, Fleming and Pfeiffer for the value of his services in making sales of machines mentioned in the complaint in this action, in which he recovered judgment for \$500.00, and that the judgment has been paid.

We have carefully read the entire record. The evidence is conflicting and unsatisfactory.

It is not clear that the jury allowed appellee anything for the alleged services rendered appellant by Wright in 1881 and 1882. The inference from the answer to the interrogatories is that the general verdict was based on the services rendered Fleming Manufacturing Company by Wright in 1883. Another inference is that he has recovered judgment for such services in another action. Whether these are the only inferences that might be drawn we will not determine. The theory of the first paragraph of the complaint is that the appellant agreed to pay said Wright a sum equal to all that he might sell the rights of appellant in and under certain letters patent, over and above \$5,000.00. One item in this paragraph is that Wright in pursuance of said agreement procured one Charles Pfeiffer to purchase of the defendant for \$7,000.00 a one-third interest in the right to manufacture and sell a leveler and grader under one of the letters.

In this connection Wright testified that in making the sale to Pfeiffer for appellant he said to him, "I will guarantee to you, you will make 50 per cent. of the money within one year," etc. * * * "I says to Pfeiffer he could have the privilege of withdrawing his money at 8 per cent. interest."

In pursuance of this conversation it was provided in the contract between Pfeiffer and appellant that appellant should, at the election of said Pfeiffer within one year, repurchase the interest sold to Pfeiffer at \$7,000.00 with 8 per cent. interest.

It clearly appears, without controversy, that Pfeiffer, within one year, exercised the privilege of withdrawing his money, with interest, and that appellant repaid the money, with interest, to him.

The court instructed the jury that under such cir-

cumstances, Wright was entitled to recover for the services in making the sale to Pfeiffer.

The exercise of Pfeiffer's privilege was not caused by any act or connivance of appellant. At least, the instruction proceeds on no such theory. As to the item growing out of the sale to Pfeiffer, the theory of the appellee in the trial court was, as we understand it, that appellant became liable to Wright on the special contract that he should have a sum equal to all he could realize for the rights in and under the patents in excess of \$5,000.00 without regard to the terms or conditions of such sale.

It was incumbent on said Wright, in our opinion, before he became entitled to recover for such services, to furnish a purchaser who was willing to pay appellant something in excess of \$5,000.00 for his rights in and under such letters patent. Pfeiffer was not willing to purchase, except on condition, that at his option, his money and interest should be returned to him within one year. He was not willing to pay appellant \$7,000.00, absolutely, for an interest in the patent without reservation. Appellee's theory was that Wright sold for appellant a one-third interest in one of the patents for \$3,000.00, and a one-half interest therein to Pfeiffer for \$7,000.00. If Wright's version of the transaction is true his own testimony shows that the sale to Pfeiffer was conditional. No theory has been suggested, on which the instruction relative to his rights to recover, on account of the sale to Pfeiffer, can be sustained. In our opinion, the testimony of Wright shows that the sale made to Pfeiffer was conditional in this, that it was upon the condition that if said Pfeiffer was not satisfied therewith at any time within one year, he was entitled to have the consideration of the sale, with interest thereon, paid back to him. This in effect gave him the right to rescind the

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sale. When he exercised his privilege, and received from appellant the purchase money, with interest, the sale was rescinded and appellant had nothing by reason of the service of Wright. As to this transaction, Wright failed to produce a purchaser who was willing to buy. There was a string to the sale which in the end entirely defeated it. The conditions which defeated the sale were made by Wright. There was nothing about the transaction of which he could rightfully complain. If he had found one or more purchasers who were ready and willing to buy appellant's rights in and under the letters patent for a sum in the aggregate in excess of \$5,000.00, Wright would have been entitled to recover such excess.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ON PETITION FOR REHEARING.

DAVIS, J.—On petition for rehearing, counsel for appellee contend that the contract between Pape and Pfeiffer, entered into on the 2d of January, 1893, was an absolute sale by Pape to Pfeiffer, with a contract on the part of Pape to repurchase of Pfeiffer at Pfeiffer's option of selling within one year. Therefore, counsel for appellee insist that the contract between Pape and Pfeiffer was a contract to repurchase, and that it was not a contract of a conditional sale or for a rescission of sale.

Wright testified that in the sale made by him for Pape to Pfeiffer, on December 30, 1882, it was agreed that Pfeiffer "could have the privilege of withdrawing his money," with interest at 8 per cent., at any time within the year.

When the agreement was reduced to writing between Pape and Pfeiffer it was expressly stipulated therein that "the purpose" of the contract, among

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other things, was to enable Pfeiffer "to withdraw from said business within one year if he so desired."

Strictly speaking, the contract between Pape and Pfeiffer may not be a conditional sale, nor do its terms provide for a rescission of the contract, but it was a contract upon the condition that if said Pfeiffer was not satisfied with his investment therein at any time within one year, he had the right to withdraw his money with interest. The use of the words "repurchase" and "resale" in the contract between Pape and Pfeiffer did not, under the circumstances, change the nature of the transaction. In other words, whatever name may be given to the transaction, there was what may be termed a string to the sale made by Pape to Pfeiffer, through Wright, which in the end entirely defeated the sale. The condition which in the end defeated the sale, so that no benefit was derived therefrom by Pape, was made by Wright. It is clear that Wright failed to find a purchaser in accordance with the agreement between him and Pape, who was willing and able to pay Pape, unconditionally, a sum in excess of \$5,000.00 for his interest in the letters patent.

In other words, the agreement made between Wright and Pfeiffer for the sale by Pape to Pfeiffer was that Pfeiffer should have the privilege of withdrawing the purchase price paid by him to Pape, with interest, within one year; and when the contract, founded upon the agreement, was reduced to writing between Pape and Pfeiffer, it was provided therein that "*this contract is made * * * to enable said Pfeiffer to withdraw from said business within one year if he so desires.*" The written contract between Pape and Pfeiffer, when construed as an entirety, in the light of the situation, and relation of the contracting parties, the object to be accomplished, and the sur-

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rounding circumstances, clearly shows that the sale negotiated by Wright for Pape to Pfeiffer was upon the condition that if said Pfeiffer was not satisfied therewith, at any time within one year, Pape was bound to return to Pfeiffer the money invested by him therein, with interest. *Wood, Admr., v. Lindley*, 12 Ind. App. 258.

In other words, the "purpose" of the contract, as expressly written therein, was to protect Pfeiffer by giving him the option of withdrawing the money invested by him, with interest, within one year. The fact that in some places in the instrument the transaction is referred to as a sale of an interest in the letters patent by Pape to Pfeiffer, with an agreement to repurchase the same by Pape, at the option of Pfeiffer, does not destroy the effect of the clear and explicit language showing that Pfeiffer was only investing his money in the business on the express condition that, at his option, he might withdraw it at any time within one year.

It is conceded that in pursuance of the terms of the contract he did withdraw the money invested in the business, with interest, within one year.

It is also earnestly insisted by counsel for appellee that "the facts found by the jury establish the ultimate fact that the \$1,250.00, allowed by the jury, was for other sales than the Pfeiffer sale."

The contention is, that the first item of indebtedness was \$500.00 on account of the purchase made by Wright for Pape, for which Pape agreed to pay Wright \$500. That the second item was for a sale made to William Fleming by Pape, without condition, for which Pape agreed to pay Wright \$750.00 for a one-third interest in the Jonathan Fleming Road Leveler and Grader, and for commission upon a sale to William Fleming of a one-third interest in the Bauer Swing.

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In other words, that the \$500.00 was "on account of the purchase made by Wright from Jonathan Fleming, for Mr. Pape, of the original road grader patent." And that the \$750.00 was for the sale of a one-third interest in the road grader patent to William Fleming "for Mr. Pape by Mr. Wright."

As to the first item, the jury expressly find, in answer to interrogatories, that \$500.00 was for services of Wright in assisting Pape "in purchasing of Jonathan Fleming an interest in his road leveler patent." In answer to another interrogatory the jury expressly find that said \$500.00 was for services rendered by Wright "as agent and employe of the Fleming Manufacturing Company." The jury also find that Pape paid Wright something over \$300.00. It is not found, however, that such payment was made on the services in connection with the purchase of the Jonathan Fleming patent.

In answer to another interrogatory the jury find that Wright performed services "for the defendant in selling graders before January 1, 1883, and while defendant was acting for himself in such business."

The inference, therefore, is that the \$300.00 was paid on services in selling graders before January 1, 1883. Another inference is, that as the Fleming Manufacturing Company, composed of Chas. Pape, William Fleming and Charles Pfeiffer, was not formed and did not begin business until January 1, 1883, the services by Wright as agent and employe of the Fleming Manufacturing Company were rendered after January 1, 1883.

As to the second item, the jury expressly find that "the firm of Charles Pape, William Fleming and Charles Pfeiffer was not formed and did not begin business until January 1, 1883," and that they allow plaintiff \$750.00 "for services of said Wright as the

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employe of the Fleming Manufacturing Company, composed of the defendants, William Fleming and Charles Pfeiffer."

It is clear, therefore, that the \$750.00 was not allowed on account of the sale of the patent to William Fleming, prior to January 1, 1883, but that it was allowed for services rendered for William Fleming and his associates after January 1, 1883.

The jury also find that suit was brought "by Wright against Pape, Fleming and Pfeiffer for the value of services in making the sales of the machines spoken of in the complaint, and the expenses incurred in making such sales," in which action judgment was recovered for \$500.00, and that the judgment was paid.

Whether any other services, except as hereinbefore indicated, were rendered by Wright for said firm, does not appear in the findings of the jury.

We cannot concur in the view of counsel that the answers of the jury to the interrogatories clearly and conclusively show that the appellee was entitled to recover \$1,250.00 from appellant for services rendered in 1881 and 1882, in the purchase made of Jonathan Fleming and in the sale made to William Fleming, and, therefore, that the error for which the judgment of the trial court was reversed was harmless.

Petition for rehearing overruled.

RHODES v. HILLIGOSS, RECEIVER.

[No. 2,091. Filed December 17, 1896.]

PLEADING.—*Complaint by Receiver.*—*Sufficiency of.*—The complaint, in a suit commenced by a receiver upon an obligation due a corporation for which he is acting, is not sufficient to withstand a demurrer, which does not allege that leave of court to institute and prosecute the action was obtained before suit was brought. *pp.* 478-481.

SAME—*Complaint.*—*Receiver.*—The necessary averment in an action

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by a receiver that he has been given leave by the court to bring the action is not supplied by the averments of the complaint that he has been appointed as receiver and has qualified and entered upon his duties as such, "and accordingly he brings this suit." p. 481.

SAME.—*Complaint.*—*Receiver.*—*Statutes Construed.*—The omission from the complaint of the necessary averment in an action by a receiver, that he has been given leave of court to bring the action, is not aided upon appeal by sections 848, 401, and 670, Burns' R. S. 1894, providing that no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appears from the whole record that the merits of the case have been fairly determined, and that technical defects, or defects in form shall not be ground for reversal. pp. 481-484.

From the Marion Circuit Court. *Reversed.*

Elmer E. Stevenson, for appellant.

William V. Rooker, for appellee.

ROSS, J.—The only question presented on this appeal is whether or not it is necessary to the statement of a cause of action, in a suit commenced by a receiver upon an obligation due the corporation for which he is acting, that it be alleged that leave of court to institute and prosecute the action was obtained before suit was commenced.

Section 1242, Burns' R. S. 1894 (1228, Horner's R. S. 1896), provides that: "the receiver shall have power, under control of the court, or of the judge thereof in vacation, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, in his own name, and generally to do such acts respecting the property, as the court or the judge thereof may authorize."

This section authorizes a receiver to bring an action only when authority to do so has been granted by the court, if in session, or the judge thereof in vacation.

In *Garver v. Kent, Rec.*, 70 Ind. 428, the court says: "There is no averment in the complaint, that the court appointing the plaintiff as receiver authorized him to

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bring this, or any action or actions in his own name, in matters concerning his receivership. The objection is fatal to the plaintiff's recovery, as the complaint states no facts showing a right of action in him."

In *Moriarty v. Kent, Rec.*, 71 Ind. 601, Elliott, J., says: "This case turns upon the question, whether the receiver of an insolvent corporation has any authority to sue in his own name upon promissory notes executed to the corporation, in cases where there is no authority conferred by statute or by the judgment of a court of competent jurisdiction."

In *Keen v. Breckinridge, Rec.*, 96 Ind. 69, the court, in construing the above section of the statute and the right thereunder to sue a receiver, says: "As a receiver, in the absence of statutory authority, can neither sue nor be sued without leave of the court by which he was appointed, we think it is essential to aver in the complaint that leave to bring the action had been granted by the proper court."

In the case of *Davis v. Ladoga Creamery Co.*, 128 Ind. 222, the court, after reviewing the authorities, including *Garver v. Kent, supra*; *Moriarity v. Kent, supra*, and *Keen v. Breckinridge, Rec., supra*, says: "Under these authorities a complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective."

In the case of *Wayne Pike Co. v. State, ex rel.*, 134 Ind. 672, which was an action instituted against the receiver, the court says: "It seems to be settled that a receiver, as a general rule, can neither sue nor be sued, without leave of the court making the appointment is first obtained."

In *Pouder v. Catterson, Rec.*, 127 Ind. 434, the court says: "It is undoubtedly a correct special proposition that, in the absence of authority derived from the

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statute or from the court ordering his appointment, a receiver has no power to sue in his own name, and that when his authority is derived from the order of the court, that fact must appear by suitable averments in the complaint." And in support of this proposition is cited *Garver v. Kent, Rec., supra*. And continuing the court says: "The reason is that the legal title to choses in action, or other property which he is authorized to reduce to possession, is ordinarily not transferred to the receiver, but remains in the owner, in whose name suit must be brought unless the statute or the order of the court authorizes the receiver to proceed in his own name."

This proposition is recognized as settled by the text writers. High on Receivers, section 208; Beach on Receivers, section 650; Kerr on Receivers, 192, 193; Edwards on Receivers, 136.

It is urged on behalf of the appellee, however, that the allegations of the complaint are sufficient, in that it is alleged that he was appointed as receiver, that he qualified and entered upon his duties as such receiver "and accordingly he brings this suit."

It is not alleged in the complaint what acts the court appointing him had authorized him to do. As heretofore stated, the statute does not authorize a receiver to bring an action, hence, the only way such authority can be conferred is by order of the court under whose direction such receiver is acting. The allegations of the complaint before us are not broad enough to show that the appellee was authorized by the court to institute the action.

It is further contended by counsel for the appellee that the cause should not be reversed for the error in overruling the demurrer to the complaint, if it appears from the record that the cause was fairly tried

and a right result reached. In support of this contention counsel cite sections 348, 401 and 670, Burns' R. S. 1894 (345, 398 and 658, Horner's R. S. 1896). These statutes may be made the cloak to cover up many irregularities in the judgment and proceedings of the trial court, but they cannot be made to supply the very foundation upon which the action rests. Without a complaint the appellee had no standing in court, and the court had no power to render a judgment against the appellant. A paper filed as a complaint will not authorize a judgment, especially, if attacked by demurrer for want of facts, unless it states a cause of action. But counsel insists that this court can look to the evidence, if it is in the record, and from it determine whether the evidence shows that the appellee was empowered by the court to bring the action, and if it does so show, that the complaint will be deemed to be amended, and further, that inasmuch as the appellant has not filed in this court a complete record containing the evidence, it must be assumed that the evidence shows that appellee did procure the authority of the court to bring this action before it was commenced.

This court cannot look to the evidence and from it determine the sufficiency of a complaint, for the evidence can neither add to nor detract from any of its allegations.

In *Johnson v. Breedlove, Admr.*, 72 Ind. 368, Worden, J., says: "It seems to us to be quite clear that where a demurrer for want of sufficient facts, either to a complaint or answer, has been erroneously overruled, and exceptions duly reserved, the defect in the pleading demurred to cannot be aided by section 580 of the code." Section 658, *supra*.

"The exception having been saved to the ruling on the demurrer, the pleading cannot be aided by refer-

ence either to the evidence or to the verdict," says Woods, J., in *Abell v. Riddle*, 75 Ind. 345.

And in the case of the *Pennsylvania Co. v. Poor*, 103 Ind. 553, Elliott, J., says: "Where a complaint is challenged by demurrer, and an exception is reserved, we cannot look into the evidence to ascertain whether injury did or did not result. The sufficiency of the complaint is to be determined from the facts stated in it, and not from what may, or may not, appear in the evidence. The court cannot examine evidence to determine a question presented by demurrer; for the demurrer presents the question fully, and the question presented must be decided according to the record."

"Where a demurrer to a complaint is overruled, the complaint must stand or fall upon its own merits. We cannot look into the evidence and from that determine whether to reverse or affirm the ruling on the demurrer," says Mitchell J., in *Pennsylvania Co. v. Marion*, 104 Ind. 239.

In the case of *Belt, etc., R. R. Co. v. Mann*, 107 Ind. 89, Mitchell J., in speaking of the sections of the statute heretofore referred to, says: "The foregoing sections have often been resorted to, but without success, in aid of complaints which failed to state facts sufficient to constitute a cause of action. Where a demurrer to a complaint which fails to state a cause of action has been overruled, the error in so ruling can not be cured by resorting to the sections relied on. The reasons have been so often stated that to state them again would serve no useful purpose."

In *Ryan v. Hurley*, 119 Ind. 115, Olds, J., speaking for the court, says: "It has been repeatedly held by this court that we cannot look into the evidence and be governed by it in affirming or reversing a judgment for error committed in ruling on a demurrer to

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a complaint. The complaint must stand on its own merits, and if there is error in overruling a demurrer to it the case must be reversed. We cannot look into the evidence to determine whether injury did or did not result from such error."

And this court, by Gavin, J., in the case of *New Kentucky Coal Co. v. Albani, Admx.*, 12 Ind. App. 497, says: "We cannot, as requested by appellee, resort to the evidence and the instructions to ascertain whether or not the error in overruling the demurrer was harmless."

The rule as announced is that the sections of the statute referred to, cannot ordinarily aid an insufficient pleading and that this court cannot look to the evidence and from it determine whether or not the ruling on the demurrer to such pleading was harmful.

The judgment of the court below is therefore reversed, with instructions to sustain the demurrer to the complaint, with leave to amend.

LOTZ, C. J., concurs in the result.

HORNBECK v. THE STATE.

[No. 2,149. Filed December 17, 1896.]

PARENT AND CHILD.—*Excessive Punishment of Child.—Assault and Battery.*—A parent has the right to administer proper and reasonable chastisement to his child, without being guilty of assault and battery, but excessive, unreasonable, or cruel punishment is unlawful. Whether the punishment inflicted is excessive or cruel is a question for the jury.

From the Greene Circuit Court. *Affirmed.*

Emerson Short, S. W. Axtell and Seymour Riddle,
for appellant.

W. A. Ketcham, Attorney-General, C. D. Hunt,
Merrill Moores and W. H. Bridwell, for State.

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LOTZ, C. J.—The appellant was indicted and convicted of the crime of assault and battery in the court below.

The only assignment of error presented for our consideration on this appeal is the overruling of appellant's motion for a new trial. The other errors assigned are waived.

It is insisted that the verdict of the jury is contrary to the law and not supported by sufficient evidence. The assault and battery was committed upon the person of the appellant's own son, a lad of thirteen years, by striking him a number of times with a buggy whip. The boy was disobedient and the parent administered the punishment for the purpose of correcting him.

The appellant's contention is that it was lawful for him to correct his son and punish him for the disobedience, and that the punishment was neither excessive nor cruel.

The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable, or cruel it is unlawful. The mere fact that the punishment was administered by the appellant upon the person of his own child will not screen him from criminal liability. Whether or not the punishment inflicted in this case was excessive or cruel was a question for the jury. *Hinkle v. State*, 127 Ind. 490.

The evidence in this case fully sustains the verdict. Judgment affirmed.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. SOUTHWICK.

[No. 1,879. Filed May 26, 1896. Rehearing denied Dec. 18, 1896.]

RAILROADS.—Negligence.—Proximate Cause.—While the conductor and a brakeman of a train were assisting others in unloading a heavy piano from a freight car, the conductor, who was within the car, stepped into a hole which had negligently been permitted to remain in the floor of the car, and thereby lost his hold on the piano the weight of which was thrown on the brakeman, by reason of which he was injured. *Held*, in an action by the brakeman against the railroad company, that the hole in the car floor was not the proximate cause of the injury and therefore the company was not liable.

NEGLIGENCE.—Fellow Servant.—The negligence of a conductor of a freight train while engaged in unloading freight, causing an injury to a brakeman assisting him, is that of a fellow servant.

From the Newton Circuit Court. *Reversed*.

E. C. Field, W. S. Kinnan, William Cummings and William Darroch, for appellant.

Simon P. Thompson, and Barnum, Humphrey & Barnum, for appellee.

REINHARD, J.—The history of this case in brief is, that the appellee was appellant's brakeman on one of its freight trains, and experienced in the duties of that position. He was injured at the station of Rensselaer, while in the line of duty and while engaged with the conductor of his train and the station agent in unloading a boxed piano from a car to the station platform. The piano weighed about eight hundred pounds. The station platform was thirteen feet wide and in good condition, but on the morning of the accident, about ten o'clock, it was covered with a thin scale of ice. Appellant had provided proper skids for the use of its employes in unloading heavy freight. The use of the

skids made the work of unloading heavy freight less dangerous to the men. Neither appellee, conductor, nor station agent made any effort to use the skids, but undertook to unload the piano from the car without the skids, or any other appliances to support the weight of the piano from the car door to the station platform. The conductor got into the car and pushed on the piano box, while appellee and the agent, by the conductor's orders, stood on the station platform, working the end nearest to the door back and forth, until they had the piano box about half way out of the door, standing substantially on the balance. Then a projecting nail head in the piano box caught in an iron strap over the sill of the car door, preventing its sliding out. There were in the floor of the car three holes which had been burned through, the largest of which would admit of the going through of a man's foot. Appellant had notice of these holes, but appellee had not, until just about the time of the occurrence of the accident, when he could see them from where he was. The conductor in the car, suddenly and quickly, without any warning, exerted his full strength on the inner corner of the boxed piano, and violently swung the inner end toward the east, and forced the box outward, and by such sudden movement wrenched the east outer corner from the hands of the agent, who was holding it. The conductor thereupon stepped through a hole in the bottom of the car and thereby wholly lost his hold on the piano, and the appellee, being unable to bear the weight of said piano so suddenly cast upon him, fell and was injured by the falling piano box. This condition of things is set out in three separate paragraphs of complaint, to each of which appellant filed a separate demurrer, the overruling of which is assigned in the record as error and is here urged as ground for reversal.

The facts pleaded are found to be substantially true by the special verdict of the jury. The question is raised whether they disclose a liability on the part of the appellant.

The appellee's counsel contend that the gist of the negligence charged and found is the defective floor with the holes burnt in it, and the consequent stumbling of the conductor into the hole, causing him to lose control over the piano; that this was the proximate cause of the injury, and that the other defects, viz: the loose iron band and the projecting nail, as well as the other matters incidentally mentioned as among the conditions existing at the time of the accident, were only "concurrent causes combined with the efficient and proximate cause" mentioned.

The special verdict, when stripped of mere conclusions and evidentiary facts, leaves it very difficult to determine as to just what caused the piano to fall upon appellee, but it seems to have been a combination of causes, including the projecting nail, the slippery condition of the platform which caused the appellee to fall, and the sudden pushing of the piano by the conductor so as to cause it to plunge forward on the appellee. It is difficult to ascertain from the jury's findings whether the stepping into the hole by the conductor was the cause of the falling of the piano, or whether the violent jerking of the instrument by him caused the conductor to slip and fall into the hole. On this subject the jury find, that the nail head in the sill of the car door "prevented, for a few seconds, the free and unobstructed progressive movement of the piano," when "the conductor suddenly and without notice to plaintiff jerked and pulled the inner end violently upward, and pushed the same eastward and forward, forcing the piano over the iron strap obstructing its passage, with great suddenness,

while at the same time the conductor's foot, slipping into one of the holes in the bottom of the car aforesaid, went through the bottom of the floor, causing him to fall and wholly lose his hold upon the piano box," etc. It is true the jury afterwards also give it as their opinion that "the worn and loose condition of the strap or iron in the threshold of the car door concurred with the holes in the car floor to cause the plaintiff's injuries under the circumstances stated in the verdict." It will not be claimed, we assume, that the conclusion referred to is any part of the finding of the facts in the case.

If the injury was caused by the negligence of the conductor in violently jerking the piano, there can be no liability, for that was the act of a fellow servant, clearly. This point was fully decided in the case of *Louisville, etc., R. W. Co. v. Isom*, 10 Ind. App. 691. In that case a gang of men were engaged in loading rails upon flat cars, the foreman of the gang having absolute power to hire and discharge men, and to whose orders all of the men owed obedience. This foreman was himself engaged with the men just as the conductor here was engaged in the performance of the service in which the plaintiff was injured. It was sought to hold the railroad company liable because the foreman was claimed to be a superior officer respecting the performance of the work, in which the plaintiff received his injury. The court quoted approvingly from Judge Lotz in *Cole Bros. v. Wood*, 11 Ind. App. 37, as follows: "The same individual may combine in his own person the functions of both master and servant. When such person performs a servant's duty, no matter what his rank or title may be, whether superintendent, manager, agent, foreman or boss, he is, in the performance of such duty, deemed

only a fellow servant with others employed in the same common business."

Granting, however, that the gist of the negligence relied upon consists, as appellee contends, in the defective car floor, we do not think the appellee has shown any liability on the part of the appellant. It is not sufficient to prove negligence and an injury, but, as appellee admits, the negligence charged and relied upon must be shown to have been the proximate cause of the injury complained of. Here we have a defective car; that is to say, it has a hole in its floor sufficiently large to admit a man's foot. The conductor could not help but see this hole, and how it was that he was required to stand immediately over it until forced into it by the weight of the piano, without gross negligence on his part, is difficult to understand. But if the accident was the result of the conductor's negligence it was, as we have shown, the negligence of a fellow servant, for which appellant is not liable.

But, conceding the negligence to be that of the appellant, it is clear to us that the consequence claimed from such negligence is too remote. According to the same logic, if the conductor had been carrying a loaded revolver in his pocket and by reason of the fall and stepping into the hole it had been discharged and had wounded the appellee, the company would have been responsible. The mere statement of such a proposition is enough to condemn it. The appellant may have been negligent in failing to repair the floor of the car, but, if so, it is not liable for every remote consequence of such omission. It is only the proximate and not the remote consequences of its negligence for which the appellant can be made to answer. There may be a thousand results which may in some sense be attributable to the holes in the floor of the car, but it cannot and will not be claimed with any degree of

sincerity, we assume, that for all consequences resulting in injury, the negligent party should respond in damages.

We have had occasion heretofore to consider the question of proximate cause and review the authorities which we found in the course of our examination. *Reid v. Evansville, etc., R. R. Co.*, 10 Ind. App. 385. It is not necessary again to enter upon an examination of the cases there reviewed. The rule stated in the case cited, that "if injury resulted from the negligent act or omission of the defendant, such act or omission will be deemed the proximate cause, unless the consequences were so unnatural and unusual that they could not, by the highest practical care, have been foreseen, and consequently provided against," is founded upon no less authority than that of our Supreme Court, and is a reasonable rule. That it applies with peculiar force to the case in hand cannot be doubted. To say that the appellant should have anticipated an accident of such a peculiar and unusual character as the one we have here to deal with, or anything akin to it, would be unwarranted.

The celebrated Squib Case, to which one of the appellee's counsel alludes, can have no application here. In that case the defendant threw the dangerous missile into a market house crowded with people. He was bound to anticipate that the squib would explode, and its burning fragments might, and probably would, be thrown upon other persons in the crowd than the one at whom it was aimed. *Scott v. Shepherd*, 3 Wils. 403.

Hence, assuming that the gist of the negligence charged is the defective car, and leaving out of consideration all questions as to other causes combining to produce the injury, as well as the questions of contributory negligence, assumption of risk, or whether

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the injury was the result of the negligence of a fellow servant, we are unavoidably driven to the conclusion, from the appellee's own theory, that the case made by the facts found establishes no liability on the part of the appellant.

Judgment reversed, with directions to the court below to render judgment on the special verdict in favor of the appellant.

DISSENTING OPINION.

GAVIN, J.—I am of opinion, upon the assumptions stated in the opinion of the majority, that the holes in the floor were the proximate and not the remote causes of the injury, and that the accident, while an unusual one, was a natural and direct result of the negligence of appellant.

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[No. 1,871. Filed May 6, 1896. Rehearing denied December 30, 1896.]

LIMITATION OF ACTIONS.—*Agreement as to When Claim is to be Paid.*

—Where it is agreed that a claim for services is to be paid at the time of settlement of a certain estate, the statute of limitations does not begin to run against an action on the claim until such estate is settled.

APPEAL.—*Review of Evidence.*—If there is no evidence to support the verdict or finding, or if there is no evidence to support any material fact essential to the verdict or finding, then such verdict or finding is an error of law and may be reviewed on appeal; on the other hand if there is some evidence to support each material fact essential to the verdict or finding, there can be no review.

From the Allen Circuit Court. *Affirmed.*

W. J. Vesey and O. N. Heaton, for appellant.

P. A. Randall and N. D. Doughman, for appellee.

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LOTZ, J.—The appellee filed a claim against the estate of Oscar A. Simons, deceased, for services alleged to have been rendered by the appellee for the decedent in the purchase of an interest in certain real estate, situate near Cadillac, Michigan. In the circuit court there was a trial by jury, which resulted in a verdict for the appellee in the sum of \$500.00.

The only error assigned in this court is the overruling of appellant's motion for a new trial. It is insisted that the verdict is not supported by sufficient evidence and is contrary to the law.

On the trial of the cause the appellee gave evidence which tended to prove that in 1881 the decedent was a trustee for himself and others of a large amount of property at Cadillac, Michigan, in which the decedent owned a one-fourth interest and the estate of one Mitchell, owned a one-half interest; the decedent was desirous of purchasing the interest of the Mitchell estate, and he procured the appellee to make the purchase in his own name. The purchase was made in 1882, and subsequently in the same year the appellee conveyed such interest to the decedent, and the decedent promised to pay appellee for his services as soon as the Mitchell estate should be settled. The Mitchell estate was settled in the year of 1884. This claim was filed August 14, 1889.

The appellant's contention is that the demand accrued in 1882 when the services were rendered and that it is consequently barred by the six-year statute of limitations.

There was evidence that tended to show that the demand should not accrue until the settlement of the Mitchell estate and as this did not occur until 1884, the statute did not begin to run until that time. In this view of the case the claim was not barred.

The rule is that the plaintiff must produce some evi-

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dence having legal weight tending to establish every material fact essential to a recovery. If he fail to produce any evidence upon any such fact, then the verdict or finding is contrary to the law, and is not supported by sufficient evidence. This court will look into the record for the purpose of ascertaining whether or not there is any evidence upon any one of the essential facts necessary to support a recovery. If there be no evidence then there is a failure of proof and this court may so declare. Or if the proof of a defense be undisputed, and the plaintiff have a verdict, this court may declare that the verdict is contrary to the law. But if upon any material fact essential to the cause of action or defense, there is any evidence having legal weight, or upon which there is a conflict, those are questions for the jury and trial court, and the legislature has expressly forbidden an appellate court to review them. On appeal, this court considers errors of law only, and not errors of fact. *Deal v. State*, 140 Ind. 354.

There was some evidence on every material issue in this case. This evidence was conflicting. We are not permitted to weigh it.

We find no reversible error in the record.

Judgment affirmed.

ON PETITION FOR REHEARING.

LOTZ, C. J.—The appellant insists that the court failed to dispose of two of his contentions on the former hearing.

The appellee's claim was not filed thirty days before the final settlement of the estate, and it is insisted that it was barred under the provisions of section 2465, Burns' R. S. 1894 (2310, Horner's R. S. 1896), see, also, *Roberts v. Spencer*, 112 Ind. 81; *Schrichte v. Stiles*

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Estate, 127 Ind. 427. It appears, however, that there were pending, exceptions to the confirmation of the report by interested parties, and the appellee had prepared and was ready to show to the court certain reasons why his claim should be allowed, notwithstanding the filing of the report, when it was agreed between the appellant's counsel and appellee's counsel that if appellee would refrain from and withdraw the showing and not attempt to prevent the confirmation of the report, that appellee's rights to have his claim allowed should not be prejudiced in the least, and that the same might be heard and tried; that acting upon this agreement the appellee did not present his showing and allowed the report to be heard.

Whether or not this showing is sufficient to avoid the statute, we need not determine. In his original brief the appellant did not discuss the effect of this agreement. This language is used: "We simply call the attention of the court to the statement and desire it to give full force to our agreement and express the hope that it will not be necessary to consider this question."

A party cannot be regarded as having stated a point when he does no more than assert in general terms that a ruling is erroneous. He must point out specifically wherein the ruling complained of is erroneous. A mere general assertion that a ruling is erroneous is not the making of a point. *Louisville, etc., R. R. Co. v. Berry*, 9 Ind. App. 63, 71. We did not dispose of this question on the former hearing for the reason that we did not consider the point made.

On the trial of the cause, the appellant offered in evidence a contract of settlement made between the appellant's decedent and the appellee in which the appellee made no claim for the services now in controversy. This offer was excluded. The settlement,

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however, was made by the decedent as trustee and the appellee, as manager, of the Fort Wayne Lumber Company and not by either of them in his individual capacity. There was no error in excluding it.

Petition overruled.

THE ECLIPSE WIND ENGINE COMPANY v. ZIMMERMAN
MANUFACTURING COMPANY.

[No. 1,768. Filed Oct. 22, 1896. Rehearing denied Dec. 30, 1896.]

PATENTS.—*Sale of Patent Right.*—*Statute Construed.*—Appellant was the owner of a certain patent right which it claimed was infringed by appellee through using certain improvements upon windmills which it made and sold. To release all liability and to provide against future liabilities, the parties entered into a written agreement by the terms of which in consideration of \$2,000, for which notes were given, appellant released appellee from all damages accrued and “granted and licensed” the appellee company to continue the manufacture of the windmills as theretofore with the patented improvement. *Held*, in an action on the notes, that the notes were not given for a patent right within the meaning of section 8130, Burns’ R. S. 1894, requiring that notes given for a patent right shall contain the words “given for a patent right.” *pp.* 496-501.

SAME.—*Sale of Patent Right.*—The sale of an unexclusive right to utilize an invention is not a sale of a patent right within the meaning of section 8130, Burns’ R. S. 1894. *p.* 501.

From the DeKalb Circuit Court. *Reversed.*

Allen Zollars and C. H. Worden, for appellant.

C. S. Denny, R. W. McBride, J. W. Baxter and C. M. Brown, for appellee.

GAVIN, J.—The jurisdiction of this court over this cause must be regarded as settled by the Supreme Court’s order. The petition for rehearing upon the motion to transfer is accordingly overruled. The questions presented in this case arise upon the special findings of the court with the conclusions of law thereon.

In 1889 appellant was the owner of a certain patent

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right, which it claimed was infringed by appellee through using certain improvements upon windmills which it made and sold. To release all liability for past damages and to provide against future liabilities, the parties entered into a written agreement by the terms of which, in consideration of \$2,000.00, appellant released appellee from all damages accrued and "granted and licensed" the said Zimmerman Manufacturing Company to manufacture windmills of the same general form and construction as those now manufactured by it, and containing said patented improvements. In a further clause of the contract it was declared "that under the terms of this license the said Zimmerman Manufacturing Company shall have the right to manufacture windmills of the general type now made by it at Auburn, Indiana, or if said company shall cease manufacturing at Auburn, then at any other one point in the State of Indiana." Notes were given for the \$2,000.00, and the appellee continued to manufacture and sell windmills of the same general form and construction as those before made by it. The notes did not contain the words "given for a patent right," nor had appellant filed in the clerk's office of the county duly authenticated copies of its letters patent, nor the affidavit required by section 8130, Burns' R. S. 1894 (6054, Horner's R. S. 1896).

For want of compliance with the statute the court held the notes unenforceable.

The sections of the statute relating to the question under consideration are as follows:

Section 8130, Burns' R. S. 1894 (6054, Horner's R. S. 1896). "It shall be unlawful for any person to sell or barter, or to offer to sell or barter, any patent right, or any right which such person shall allege to be a patent right, in any county within this State, without

first filing with the clerk of the court of such county copies of the letters patent, duly authenticated, and, at the same time, swearing or affirming to an affidavit, before such clerk, that such letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented; which affidavit shall also set forth his name, age, occupation and residence, and, if an agent, the name, occupation, and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person, on demand."

Section 8131, Burns' R. S. 1894 (6055, Horner's R. S. 1896). "Any person who may take any obligation, in writing, for which any patent right, or right claimed by him or her to be a patent right, shall form the whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words 'given for a patent right.'"

Section 8132, Burns' R. S. 1894 (6056, Horner's R. S. 1896). "Any person who shall sell or barter, or offer to sell or barter, within this State; or shall take any obligation or promise, in writing, for a patent right, or for what he may call a patent right, without complying with the requirements of this act; or shall refuse to exhibit the certificate when demanded, shall be deemed guilty of a misdemeanor, and, on conviction thereof before any court of competent jurisdiction, shall be fined in any sum not exceeding one thousand dollars, or be imprisoned in the jail of the proper county not more than six months, at the discretion of the court or jury trying the same, and shall be

liable to the party injured, in a civil action, for any damages sustained."

The instrument referred to clearly confers upon appellee no interest in the patent itself. It is a mere license by which appellee acquired the privilege of making and using the patented improvement upon the windmills it manufactured, together with the right to sell such windmills thus constructed. It was stated in *Ft. Wayne, etc., R. R. Co. v. Haberkorn*, 15 Ind. App. 479, that "A patent is a grant to the patentee, his heirs and assigns, for a stated period, of the exclusive right to make, use, and vend the invention, or discovery, throughout the territory of the United States. The patentee may, by writing, assign or convey an entire or partial interest in the patent by conveying: first, the whole patent, comprising the exclusive right to make, vend, and use the invention throughout the United States; or, second, an undivided right or share of that exclusive right throughout this entire country; or, third, the exclusive right under the patent within a specified part of the United States. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title to so much of the patent itself. Any assignment or transfer short of one of these is a mere license, giving the licensee no interest in the patent. A transfer, or grant of a right to make and use a patented appliance upon a particular machine, or number of machines or cars, could not, then, be more than a license to so make and use it within such fixed limits. *Waterman v. MacKenzie*, 138 U. S. 252; *Mitchell v. Hawley*, 16 Wall. 544, Walker Pat., section 296; Robinson Pat., section 806."

Can the granting of such a license be deemed a sale of the patent right within the meaning of these statutes?

The proposition herein involved has not been passed upon directly by any other court so far as we have been advised. The constitutionality of such laws has been the subject of much conflict among the various courts; some uphold laws more or less similar. *Tod v. Wick*, 36 Ohio St. 370; *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198; *Tilson v. Gatling*, 60 Ark. 114, 29 S. W. 35; *Haskell v. Jones*, 86 Pa. St. 173, uphold note clauses. *Reeves v. Corning*, 51 Fed. 774, sustains the requirements as to duly authenticated copies, but disapproves the note clause. *Mason v. McLeod*, 57 Kan. 105, 45 Pac. 76.

Others declare them to be in conflict with the federal laws upon a subject over which federal authority is supreme. *Hollida v. Hunt*, 70 Ill. 109; *Critenden v. White*, 23 Minn. 24; *Castle v. Hutchinson*, 25 Fed. 394; *Cranson v. Smith*, 37 Mich. 309; *Wilch v. Phelps*, 14 Neb. 134; *Ex Parte Robinson*, 2 Bissell 309.

It is not our province to enter upon a consideration of this much mooted question. We must accept as final the repeated later adjudications of our own Supreme Court which recently said in *Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148: "Counsel for appellant urge that this statute is in conflict with the federal constitution and therefore void. This question has been settled to the contrary in this State, and is no longer an open question. *New v. Walker*, 108 Ind. 365; *Hankey v. Downcy*, 116 Ind. 118; 1 L. R. A. 447; *Pape v. Wright*, 116 Ind. 502.

The peculiar characteristic of a patent right is its quality of exclusion. The right bestowed by a patent is that of excluding all others from enjoying the benefit of the invention. The right of the patentee either to use it himself or to sell it, he possesses naturally and without any patent. *Herdie v. Roessler*, *supra*; *Tod v. Wick*, *supra*.

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When he has granted to another a part of this right of exclusion, he has conveyed away a portion of his patent right, an interest therein.

In *Bloomer v. McQuewan*, 14 How, (U. S.) 539, it is said: "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly."

Unless the purchaser by the transaction acquires an interest in the "patent right" we are unable to see how there can be said to have been a sale of the patent right. It would be an anomalous condition if we should declare that the patentee had sold his patent right in whole or in part, while he still remained the sole owner of the patent. This, however, is the result to which appellee's contention would lead us, because, as we have already seen, a licensee does not by his license acquire any interest in the patent, but merely an unexclusive right to utilize the invention. The distinction between the franchise or monopoly which the patent gives him, and the invention itself to which the inventor is fully entitled either for use or sale without the patent, is elaborated and made plain in *Robinson on Patents*, section 753, *et seq.*

That the statute contemplates the sale of some exclusive right which would amount to an interest in the patent itself is plainly indicated by the language of Judge Elliott in *New v. Walker*, *supra*: "Where it is evident that the intention of an instrument is to vest in the assignee the whole and exclusive interest in a patent right for a designated territory, no ingenuity

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in framing the instrument will carry the transaction beyond the reach of the statute. * * * In the case before us, there was a grant of all the beneficial interest that the patentee possessed [in the territory named], and the case is, therefore, within the statute." It is clear from the entire opinion in that case that the transfer was of such an exclusive right within certain defined territory as would constitute an interest in the patent. An examination of the original record confirms this view. While the contract may have been in form a license, it was in fact a conveyance of an interest in the patent and the court regarded not the form, but the substance, and gave effect to it as such. The distinction between a sale of a patent and a license under it is recognized in *Union, etc., Co. v. Johnson, etc., Co.*, 10 C. C. A. 176, 61 Fed. 940.

In some states where such statutes have been sustained, viz.: Ohio, Pennsylvania, and New York, the language of the acts is broader than ours, expressly including any right to make, use or vend, but it is also to be observed that in the cases upholding the law it is affirmed that the only effect of non-compliance with the statutes in those states (so far as affects the civil rights of the parties with which we are now concerned), is to make the notes, in the hands of those having knowledge of the consideration, open to such defenses as may exist.

In the cases of *Robertson v. Cooper*, 1 Ind. App. 78, and *State Nat. Bank v. Bennett*, 8 Ind. App. 679, the question here considered was not raised by counsel nor passed upon by the court.

Counsel for appellee very ingeniously argue that whenever the patentee bestows upon another any portion of the right which would otherwise rest in the patentee, that there is a sale of a "patent right" within the meaning of the statute. Were we to give the stat-

ute this far-reaching construction then the sale of every patented article by the patentee would fall under the ban of the law, unless there was compliance with this statute, because, as stated in *Mitchell v. Hawley, supra*, where a patentee has himself constructed and sold a patented article, or authorized another so to do, "the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right." It will be noted that the court places a sale of the patented appliance, and a license to another to make and sell it, as we have in this case, upon the same footing and considers them together. Our own court, however, has decided that the statute does not apply where there has been a sale of the article itself. *Hankey v. Downey*, 116 Ind. 118.

Thus it is plain that that construction is too broad which would apply the statute to every instance where the patentee has waived his own right of exclusion and bestowed upon another a right which, but for that bestowal, he would not be privileged to exercise.

We feel, therefore, both authorized and required to give to this statute that construction which gives to the language used a meaning consistent with all our decisions and with the ordinary legal significance of the terms used therein, and accordingly hold that it applies only to cases where some interest in the patent right is transferred, and not to mere non-exclusive licenses.

Keeping in mind the fact that by this statute the vendor's right of recovery is lost, even though the vendee may have received full value, we ought not, by construction, to extend it beyond what it appears upon its face to contemplate when fairly and reasonably construed. If it be wise and beneficial to the people that it should be so extended, the remedy is easily attain-

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able by appeal to the legislature. We, however, are not able to see any good reason why we should strain the law to enable a party to defeat an obligation to which it makes not even a pretense of a defense upon its merits.

So far as concerns the civil rights and obligations of the parties, we fail to discern how the view of the law taken by us lessens the rights of any one really entitled to protection. If, without a compliance with the statute, the note is made payable in bank, it is valid, under our adjudications, in the hands of an innocent holder, notwithstanding the violation of the law. If it is not payable in bank, or is not in the hands of an innocent holder, then the maker is entitled to the benefit of any defense which he may have.

Judgment reversed, with instructions to restate the conclusions of law, and render judgment in appellant's favor.

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v. MERCER.

[No. 1,921. Filed Oct. 15, 1896. Rehearing denied Dec. 30, 1896.]

CONTRACT.—*Interpretation.*—*Instruction.*—C entered into a written contract with M to furnish 1,200,000 brick to be used in the construction of a sewer which M was under contract to build, delivery to commence about April 1, at the rate of not less than 300,000 brick per month. It was well known to C that M was under contract to complete the sewer by August 1, but this fact was not inserted in the contract. *Held*, on the trial of an action brought by M against C, for failure to furnish the brick in accordance with the contract, that it was erroneous to instruct the jury that it was the duty of C to furnish the whole of said 300,000 brick, so to be delivered each month, early enough in the month to enable M, by the exercise of reasonable diligence, to lay the same in the sewer within the month. *pp.* 505-510.

SAME.—*Construction.*—*Extrinsic Facts.*—The rights plainly given by the terms of a contract are not to be reduced or lessened by construction unless it shall appear by extraneous facts that such reduc-

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tion is essential to the accomplishment of the object for which the contract was made. *p. 510.*

From the Marion Superior Court. *Reversed.*

James E. McCullough and Henry N. Spaan, for appellant.

John S. Duncan, Charles W. Smith and Henry H. Hornbrook, for appellee.

GAVIN, J.—Appellee recovered damages for appellant's failure to furnish the brick called for in the following contract:

“INDIANAPOLIS, IND., March 3, 1893.

MR. WM. R. MERCER:

Dear Sir: We hereby agree to furnish you 1,200,000 brick for your sewer on East street at seven dollars and fifty cents (\$7.50) per M. delivered on the street along the line of your work as directed. The brick to be from 2 3-8 to 2 1-2 inches thick, and 8 to 8 1-2 long, and acceptable to the city engineer. Delivery to commence about April 1st, at the rate of no less than 300,000 brick per month. Settlement to be made the 3d day of each month for all brick delivered the month previous. Respectfully,

CONSOLIDATED COAL AND LIME COMPANY,
AUG. M. KUHN.”

“I accept the above proposition. W. R. MERCER.”

The court gave the jury the following instruction:

“The written contract must be construed in the light of the circumstances surrounding the transaction as known to both parties. If you shall believe from the evidence in the cause that at the time the written contract was entered into, if you shall find it was entered into, the defendant knew that the plaintiff had entered into a contract with the city for the construction of a sewer; that the said brick was con-

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tracted to be furnished by the defendant for the construction of the sewer; that by the terms of the contract the plaintiff was required to complete said sewer by the 1st of August, and this fact was then known to the defendant, then I instruct you that by the proper construction of such contract between plaintiff and defendant it was the duty of the defendant to furnish the whole of said 300,000 brick, so to be delivered, each month, early enough in the month to enable the plaintiff, by the exercise of reasonable diligence, to lay the same in the sewer within such month."

The correctness of this construction of the contract is the question presented for our determination.

It will be noted that the only extraneous facts and circumstances by the light of which we are, according to this instruction, to construe the contract, are that the contract for the sewer called for its completion by August 1st, and that this was known to appellant.

Counsel upon both sides lay no stress upon the words of the contract "as he may direct," presumably confining them to the place of delivery. We shall, therefore, so regard them here.

It is conceded by the learned counsel for appellee that if this were a contract for a general sale and delivery the appellant would have been entitled to the entire month for the delivery of each 300,000 brick, but it is insisted that because these brick were to be furnished for use in this special sewer which was to be completed by August 1st, therefore, the parties must be deemed to have intended a delivery of the last 300,000 in time for them to have been laid prior to that date, and that since the contract prescribes no different rule for the other months, therefore, the same intention must be held to be indicated as to them.

Counsel further concede that they may not, by

parol, vary the terms of the written agreement, but they claim that "the words may not appear to have any ambiguity whatever in their meaning on the face of the contract, and yet when applied to the facts of the particular case may have a very different meaning from their natural import." They say: "It is not our attempt to introduce new words into the contract; only to discover what was the intention of the parties in using the language which they did use."

Much stress is laid upon the case of *Bradley v. Steam-Packet Co.*, 13 Peters 89, where under a contract to hire the boat, Franklin, "until the Sydney is completed," the defendants were permitted to show that they were mail contractors engaged in carrying the mails, using the river so long as the absence of ice would permit, and transporting the mails by land when navigation closed, and that they were then building the Sydney for use in such business; all of which facts were known to plaintiffs. This evidence was held receivable to show that the contract was terminable when navigation on the river closed, although the Sydney was not yet completed. The recognized legal principle upon which the decision is based is that extrinsic evidence is admissible to enable the court to apply the contract to the subject-matter; the court saying, however, that the "subject-matter" extends beyond the mere designation of the thing or corpus upon which the contract operated and includes the circumstances which accompany the transaction.

This application of the principle by which extrinsic evidence is receivable to determine and identify the subject-matter of the contract is an extreme one, although the basic principle itself is thoroughly established, and three of the justices, including Judge Story, dissented from such application.

In the later cases to which our attention has been

called, wherein the case is cited, it has been to sustain the general proposition that the surrounding circumstances are admissible to ascertain the subject-matter. *Sorensen v. Keyser*, 2 C. C. A. 92, 51 Fed. 30; *U. S. v. Peck*, 102 U. S. 64.

While some of our own decisions, as well as outside authorities, seem to hold that evidence of the situation of the parties and surrounding circumstances is always admissible to aid in ascertaining the true meaning of a contract, later cases in our Supreme Court declare the law to be that "if the words of the instrument are clear in themselves it must be construed accordingly," and seem to limit the right to introduce evidence of extraneous facts and circumstances (for the purpose of construing, not applying, the contract) to those cases where the terms employed are ambiguous, or susceptible of more than one meaning. *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; *Olds Wagon Works v. Coombs*, 124 Ind. 62; *Fidelity, etc., Co. v. Teter*, 136 Ind. 672.

The members of the court are not agreed as to whether this contract is such as that the extraneous circumstances may be resorted to for the purpose of giving to it any other meaning than that each month is allowed for the delivery of the 300,000 brick, but we are all agreed that, assuming for the purpose of this case that the rule declared by counsel is applicable to the contract in hand, this would not be strong enough to sustain the instruction given. There is not in the extrinsic facts thus assumed by it sufficient force to require the interpretation adopted by the court. Construed as claimed by appellee it would read in legal effect,—“We agree to furnish for your main East street sewer which you are under contract to complete by August 1st, 1,200,000 brick; delivery to commence about April 1st at the rate of not less than 300,000 per

month." The extrinsic facts, the existence of which are required by the instruction, and which we have incorporated in the contract above, do indeed indicate the strong desirability upon the part of appellee of having the brick in time to complete his contract, and the probability that the parties expected them to be so furnished; yet, upon the facts required by the instruction, it does not appear but that the contract might have been fully completed on time, with the first 300,000 all on the ground by May 1st, the second lot all there by June 1, the third by July 1, and the last during that month in time to be laid before August 1.

It does not appear that when the contract was entered into appellant knew when the work would be commenced, nor how rapidly it would progress. It does not appear that it was necessary to the completion of the contract on time that any work should be done in April.

We do not think it can fairly be required of appellant, that because it knew appellee was to complete his sewer by August 1st, appellant must furnish the brick at such times and in such quantities as would be desirable to appellee. It is to be presumed that appellee, before he made his contract, determined when and in what amounts he would need them and so provided in the writing. Had he intended to receive, and appellant to deliver, the brick, so that each lot could have been laid each month, then this provision should have been incorporated in the agreement. It is now too late to call upon the court to insert for his benefit this desirable provision.

To require appellant to furnish the brick so that, through the exercise of diligence, the contract might be completed by the time fixed, is the utmost which the extrinsic facts would justify. They are not sufficient, as we view them, to authorize the court to say

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as a matter of law, that by reason of their existence the appellant must be deemed to have agreed to furnish each 300,000 brick so that they might be laid in that month. When parties make a written contract the terms should be embodied in it at the time. It might well be, that had this requirement been written into the contract, the appellant would not have acceded thereto. It was entitled to a voice in the creation of the contract. With a knowledge of the character of the articles being bargained for, it is doubtless true that the parties did not expect that the entire 300,000 brick would be dumped in on the last day of the month. Yet, by reason of the uncertainty as to his ability to procure so many brick within so short a time, appellant may have been unwilling to bind itself more definitely than to furnish them during the month, thus giving itself that much leeway in obtaining them. The right apparently given it by the terms of the instrument are not to be reduced and lessened by construction, in any event, unless such reduction shall appear by the extrinsic facts to have been known to it at the time to be essential to the accomplishment of the object for which appellee made the contract. If it was to appellee a mere matter of convenience or profit to so have the contract, or if its necessity was not at the time of its execution known to appellant, then appellee is not entitled to have it interpolated into the contract by construction. It is the province of the parties and not of the courts to make their own contracts.

By adopting appellee's construction we do more than ascertain the subject-matter and apply the contract to it. We, in effect, add new terms to it. To do so is, as was said in *Shipman v. Saltsburg Coal Co.*, 10 C. C. A. 311, 62 Fed. 145, to impose upon it a distinct and unexpressed obligation.

We quote as pertinent to the question here decided the following from the opinion of Lord Denman in *Aspdin v. Austin*, 5 Adol. & El. (N. S.) 671, which was approved by the United State Supreme Court in *Maryland v. Railroad Co.* 22 Wall. 105:

“Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application.”

Judgment reversed.

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BRUDI v. TRENTMAN.

[No. 1,799. Filed Oct. 14, 1896. Rehearing denied Dec. 30, 1896.]

PRACTICE.—*Harmless Error*.—It is harmless error to sustain a demurrer to a good paragraph of answer when the same defense can be made under another paragraph, although such paragraph was not filed until after the ruling on such demurrer. p. 514.

VERDICT.—*Special Finding*.—*When not Ambiguous*.—In an action on a note to which defendant pleaded the statute of limitations, and that a certain payment made thereon was made in accord and satisfaction and full settlement of the note, a finding by the jury that "the defendant on December 8, 1886, paid in money to the plaintiff or his agent the sum of \$400 as a payment on said note, and not otherwise," sufficiently shows that the payment was not made by way of compromise or settlement or in accord and satisfaction. p. 515.

SAME.—*Finding of Facts not Within the Issues*.—Facts found in a special verdict which are not within the issues and evidence bearing thereon, are irrelevant and must be disregarded. p. 516.

LIMITATION OF ACTIONS.—*Part Payment of Debt*.—*Implied Promise to Pay Balance*.—The voluntary part payment of a debt, made as such, is an acknowledgment of an existing obligation, and from such acknowledgment a promise to pay the balance may be implied. p. 517.

SAME.—*Proof of Part Payment*.—*Revival of Action*.—*Statute Construed*.—Part payment of a debt before it is barred by the statute of limitations may be proved by parol and a new promise inferred therefrom, as the statute, section 302, Burns' R. S. 1894, requiring a written acknowledgment or new promise to revive a debt applies only where the debt is barred. p. 518.

EVIDENCE.—*Admissibility of*.—*Parol Promise to Pay a Debt Barred by Statute of Limitations*.—Parol evidence of statements of defendant, at times other than when the payment on the note in suit was made, acknowledging the debt and promising to pay the same is admissible to rebut evidence of an agreement that such payment should be in full satisfaction of the debt. p. 518.

From the Allen Circuit Court. *Affirmed*.

Robert Lowry, for appellant.

Walpole G. Colerick and William E. Colerick,
for appellee.

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LOTZ, J.—On January 27, 1869, the appellant executed his promissory note payable to B. Trentman & Son, a copartnership, of which firm the appellee is the surviving partner. The note was due one day after date and was given for the sum of \$629.68. This suit was instituted on July 7th, 1890, to recover a balance alleged to be due thereon. The complaint shows that several payments had been made and credited upon the note. The last payment being for \$400.00 and made on the 3d day of December, 1886.

The defendant (appellant) filed seven paragraphs of answer; the first, fifth, and sixth were afterwards withdrawn, the first being the general denial. Demurrers were sustained to the third and amended fourth, and overruled as to the seventh. A reply was filed and the issues joined were tried by a jury and a special verdict returned, upon which the court rendered judgment for the appellee in the sum of \$900.78.

The rulings of the trial court in sustaining the demurrers to the third and amended fourth paragraphs of answer are assigned as error in this court.

The second paragraph pleaded the twenty-year statute of limitations. The third paragraph avers in substance that the plaintiff's cause of action did not accrue within twenty years before the bringing of the action, and that as to the \$400.00 payment set forth in the complaint, made on December 3d, 1886, the same was not made as a part payment; that at the time the payment was made there was nothing due on the note; that the defendant had fully paid the note seventeen years before; that when the payment was made on December 3, 1886, the note was outstanding and uncanceled, and that a balance purported to be due thereon, and that a demand was made upon him for the same; that in order to buy his peace and avoid be-

ing harassed by litigation he paid the said sum of \$400.00 to the plaintiff's agent upon a conditional agreement and understanding that the same was to be in full discharge and satisfaction of any supposed or alleged liability on his part to the plaintiff; that the agent was to notify the plaintiff of such agreement, and if the same was not satisfactory to the plaintiff the defendant was to be notified of such non-concurrence; that no notice was ever given defendant that the plaintiff did not concur in the agreement, although three years had elapsed since making the same.

The amended fourth paragraph contains substantially the same averments as the third, the only difference being that in addition to buying his peace the same facts are pleaded as an accord and satisfaction.

The seventh paragraph of the answer is very long, but in substance it contains the same averments as the third and amended fourth, and the facts are pleaded as a compromise and settlement in full. No motion to separate the different defenses in this paragraph was made.

A demurrer was overruled to the last paragraph.

We do not find it necessary to determine the sufficiency of these answers. The seventh paragraph having been held good, and not having been withdrawn, all the evidence admissible under the third and amended fourth (assuming them to be good) could have been given under it.

It is harmless error to sustain a demurrer to a good paragraph of answer when the same defense can be made under another paragraph. *Kniss v. Holbrook, ante*, 229.

At the time the court ruled on the demurrers to the third paragraph and the amended fourth, the seventh paragraph had not yet been filed. Appellant's

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learned counsel insist that as this paragraph had not been filed when the ruling was made the error is not harmless; that the trial court in making the ruling complained of could not have been influenced by the fact that there was another paragraph under which the same defense could be made.

It may be true that at the time the trial court made the rulings it was not influenced by the presence of the other paragraphs. But whether a ruling is hurtful or harmless must be determined by a consideration of the whole record. When the cause came to trial the appellant could have made the same proof under the seventh paragraph as he could have made had the third and amended fourth remained in.

The ruling should not be considered as standing alone, but should be considered in connection with the whole record. Oftentimes an erroneous ruling is rendered harmless by the subsequent acts of the parties. Had the appellant stood on the first rulings, a different question might have been presented. But he voluntarily chose to file another answer which was held good and under which he could have made, and no doubt did make, the same proof as he could have made under the other paragraphs. It would be a travesty on justice to hold the rulings reversible error under such circumstances.

The appellant's motion for a *venire de novo* was overruled and this ruling is one of the errors assigned.

There were several causes assigned in this motion only two of which are discussed by appellant's counsel. One is that the verdict is ambiguous and uncertain; and the other is that the findings consist of evidence only and even that not relating to any material issue in the case. The other causes are waived by a failure to discuss them.

That the appellant executed the note, and that he

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made a payment of \$400.00 on December 3, 1886, were conceded facts in the case and were so found by the jury.

The verdict finds "that the defendant on December 3d, 1886, paid in money to the plaintiff or his agent the sum of \$400.00 as a payment on said note and not otherwise."

There is nothing ambiguous in this finding. It clearly states that the payment was on the note. If it was made as a payment on the note it could not have been paid in accord and satisfaction or by way of a compromise or settlement.

As to the other cause of the motion for a *venire*, it is proper to say that the finding did contain some irrelevant facts, but it did not consist of evidence merely. Facts not within the issues and evidence bearing thereon are irrelevant and must be disregarded. There was no error in overruling the motion for a *venire*.

The appellant's motion for a judgment on the verdict was overruled and the court rendered judgment in favor of the appellee on the verdict. These rulings are assigned as error.

The verdict finds that the note was executed by the appellant and that he made a payment of \$400.00 thereon on December 3, 1886.

Bearing in mind that under the issues in this case, there being no general denial, the burden rested upon the appellant.

Proof of the execution of the note, and of the amount due thereon, *prima facie* established the plaintiff's right to recovery. To do this it was only necessary for him to produce the note. To defeat this right, the burden rested on the defendant to establish his answer of the statute of limitations, and of the special agreement pleaded in the seventh paragraph.

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The voluntary part payment of a debt, made as such, is an acknowledgment of an existing obligation, and from such acknowledgment a promise to pay the balance may be implied. It is *prima facie* sufficient to revive the debt, although such *prima facie* case may be rebutted by attendant circumstances inconsistent with such revivor. *Meitzler v. Todd*, 12 Ind. App. 381; *Christian v. State, ex rel.*, 7 Ind. App. 417. But this action is on the note and not on the implied promise to pay the balance. The defense of the statute of limitations may be waived. When pleaded the pleader assumes the burden of proving it. It was incumbent on the appellant to overcome the presumption that the part payment did not operate as a revivor of the note. When the debt is revived it is revived from the beginning, not simply from the time of the payment.

In the verdict before us we have the fact found of the execution of the note, and of a payment thereon before twenty years had elapsed after its execution, and of a balance due thereon. It was incumbent on the defendant to produce the facts in the verdict to show that the \$400.00 was not made as a payment thereon, or that there was an agreement that that sum was paid in full satisfaction and discharge of the note. There are no findings of this kind. The verdict, therefore, was sufficient to support a judgment in favor of the appellee, and insufficient to support a judgment for appellant.

The last error assigned is the overruling of the appellant's motion for a new trial.

Twenty different causes were assigned for a new trial. They all relate to the admission of certain items of evidence over the objections of the appellant.

The appellant admitted the \$400.00 payment. The only controversy in the case related to the alleged

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agreement that it was made in full satisfaction of the note.

The appellant, in his evidence, testified to the agreement as alleged in his answer, and as having been made with the appellee's clerk. The appellee, in rebuttal, was permitted to testify concerning conversations had with appellant, and of parol statements and acknowledgments and promises made concerning the claim at times other than when the payment was made. It is insisted that this was error. And the case of *Kisler v. Sanders*, 40 Ind. 78, is relied upon to support this contention. The case cited bearing upon this point, decides that when a debt is barred by the statute, it cannot be revived, except the acknowledgment or new promise be contained in some writing signed by the party to be charged thereby. Section 302, Burns' R. S. 1894. But, if a part payment be made before the bar has intervened, such payment may be proved by parol, and from such part payment a new promise may be inferred. In the case at bar the payment was made before the bar of the statute intervened, and parol testimony was admissible as to what was said and done and agreed upon at the time the payment was made. As to the parol evidence concerning the statements of appellant at times other than when the payment was made, this was proper to rebut the testimony of appellant that there was an agreement that the payment should be in full satisfaction. It was not an effort to prove by parol an acknowledgment or new promise after the debt was barred, for there was no such issue in the case.

Concerning the other items of evidence admitted over appellant's objection, some of them were proper as bearing upon the action and conduct of the parties. Other items were immaterial, but we find no reversible error in the admission of any of them.

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We have considered the evidence, and are of the opinion that it fully sustains the verdict and clearly establishes the appellee's right of a recovery. The judgment rendered is just.

Judgment affirmed.

ROUYER, ADMINISTRATRIX, ETC., v. MILLER.

[No. 2,080. Filed May 14, 1896. Rehearing denied December 30, 1896.]

TRIAL.—*Conflict Between General Verdict and Answers to Interrogatories.*—Answers to interrogatories control the general verdict only when the antagonism between them is so great that it cannot be removed by any evidence admissible under the issues. *p. 520.*

EVIDENCE.—*When Sufficient to Show Note to be in Hands of Attorney for Collection.*—Evidence showing that the payee of a certain promissory note had died, and that such note had come into possession of the attorney for the administratrix of payee's estate; that such attorney treated with the maker in reference to the payment of the note, and advised with the son of the decedent in reference to a credit claimed; after which said attorney refused a tender made by maker, and finally with other attorneys brought suit on the note, is sufficient to show that the note was in the hands of said attorney for collection at the time the tender was made. *p. 521.*

ATTORNEY'S FEES.—*When May be Recovered.*—Where a note stipulates for the payment of attorney's fees, such fees are recoverable if the note has been placed, after maturity, in the hands of an attorney for collection, and a liability for services has been incurred by payee. *p. 522.*

SAME.—*When the Amount of Fees is Fixed in Note.*—The amount of attorney's fees fixed in a note is *prima facie* the sum recoverable, subject to be reduced by proof that such sum is unreasonable and excessive, or that the plaintiff has not incurred a liability to pay the full amount. *p. 522.*

TENDER.—*When Must Include Attorney's Fees.*—Tender of the amount due on a promissory note must include attorney's fees, when the note calls for such fees, and is in the hands of an attorney for collection, and there is a dispute about the amount due. *pp. 523-525.*

SAME.—*When Need Not Include Attorney's Fees.*—Where tender is sought to be made by the maker of a note of the full amount thereof, and the holder of such note should refuse to give information concerning the attorney's fees when called for, or should the

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debtor be ignorant of the employment of the attorney, or the tender be refused upon other grounds, and he be thereby misled, the court would doubtless protect the debtor in making such tender. *p. 525.*

TRIAL.—*Right to Open and Close.*—Whenever the plaintiff has any proof to make either, as to the facts necessary to establish a case, or as to the amount of damages recoverable, he is entitled to the open and close. *p. 124.*

EVIDENCE.—*Account Book, When Admissible.*—A page of decedent's account book is not admissible in evidence without proof as to when and where the entries were made, and that they were made in decedent's handwriting. *pp. 526, 527.*

From the Marion Superior Court. *Reversed.*

Ayres & Jones and Denny & Taylor, for appellant.

W. H. H. Miller, F. Winter and J. B. Elam, for appellee.

GAVIN, C. J.—Appellant sued appellee upon two promissory notes executed by him to John B. Mazelin, of whose estate appellant is administratrix. Each note is dated February 27, 1878, one being for \$1,000.00 and the other for \$10.00. The answers were payment,—payment reducing the sum due to \$700.00 upon May 16, 1891, and a tender of that amount kept good by bringing it into court; a set-off of \$40.00; and, as to the \$10.00 note, that it was given for usurious interest. A trial by jury resulted in a general verdict for appellee with certain answers to interrogatories.

The answers to interrogatories control the general verdict only when there is between them and it a conflict irreconcilable upon any reasonable hypothesis within the issues. In determining this question we look, not to the evidence which was given, but to that which might have been introduced. *Simons, Admr., v. Beaver*, 15 Ind. App. 510. There was a general plea of payment. The special answers find that upon a certain day \$600.00 was paid in addition to \$550.00 previously paid. They do not find that this is all that

was paid. It is wholly consistent with all the answers that the entire balance may have been paid on that day. Appellant was not, therefore, entitled to judgment upon the verdict as asked for.

The notes contained absolute provisions for the payment of attorney's fees of 5 per cent. upon the amount due.

The evidence is undisputed that upon May 16, 1891, appellee tendered to Judge Ayres, who then had possession of the note as appellant's attorney, \$700.00. Upon this tender appellee relies. It is also proved that appellee had shown to Ayres & Jones a receipt for \$600.00, for which he claimed an additional credit, and that they had sent for Edward Mazelin, a son of decedent, and showed it to him and consulted with him as to whether they should allow it. The record further discloses that Ayres & Jones did afterward, with other attorneys, begin and prosecute this action. If attorneys' fees are to be included in the amount due upon the \$1,000.00 note, May 16, 1891, it is clear that the tender was not sufficient. Appellee's position is, first, that there is no evidence that the note was in the hands of attorneys for collection so as to impose upon appellant any liability therefor; second, that even if it were, there is no evidence as to the value of such services; third, that the tender was refused upon other grounds and appellant cannot now change front.

In none of these propositions do the facts and law applicable thereto, as we view them, sustain appellee. As we have indicated, there is evidence that the note was in the possession of Ayres & Jones as attorneys for appellant, that they were treating concerning it with appellee and advising with a son of decedent with relation to whether they should accept a \$600.00 receipt. The tender was made to the attorneys and they brought suit on the note. There is here sufficient

evidence to justify, if not absolutely to require a finding that the note was in the attorneys' hands for collection at the time of the tender. In fact, unless it was, we are at a loss to see how the tender could be effective. *King v. Finch*, 60 Ind. 420. For whatever services had been rendered, the attorneys were certainly entitled to compensation. Had they accepted the \$700.00, and thus collected the money, appellant would have been under legal obligation to pay them therefor. Neither the law nor the general experience of mankind will authorize us to presume that they were rendering these services gratuitously. We are in full accord with the assertion of appellee's counsel that agreements in notes for the payment of attorney's fees are contracts of indemnity purely, and cannot be made a cloak for speculation and profit by the holder, whether the amount be specified in the note or not. *Kennedy v. Richardson*, 70 Ind. 524; *Goss v. Bowen*, 104 Ind. 207; *Harvey v. Baldwin*, 124 Ind. 59; *Starnes v. Schofield*, 5 Ind. App. 4; *Moore, Admx., v. Staser*, 6 Ind. App. 364; *Judson v. Romaine*, 8 Ind. App. 390.

It must also be regarded as settled by the case of *Moore, Admx., v. Staser*, *supra*, that attorney's fees are recoverable where a note has been placed, after maturity, in an attorney's hands for collection and a liability to him for services has been incurred.

We are further of the opinion that both the earlier and later authorities establish and recognize that where the amount is fixed in the note this is *prima facie* the sum recoverable, subject to be reduced by proof that this is unreasonable and excessive, or that the plaintiff has not really incurred a liability to pay the full amount.

In *Smiley v. Meir*, 47 Ind. 559, the Supreme Court considered the effect of a stipulation to pay a fixed sum as attorney's fees, not upon the assumption, as

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counsel would imply, that the contract was not one of indemnity and that the sum named was incontrovertible; on the contrary, the court expressly declines to determine that question, and says: "*Prima facie*, we think, the amount or rate stipulated for is to govern in a suit on the note, and in this case the amount or rate was not excessive. * * * * No other evidence [than the note] of the amount of the fee was introduced, or was necessary." This holding was approved in *Glenn v. Porter*, 72 Ind. 525.

In *Toler v. Keiher*, 81 Ind. 383, a special verdict allowed 5 per cent. attorney's fees on principal and interest. That was the amount named in the note. There was in the verdict no finding as to the value of the services, yet the verdict, as to the amount of recovery, was approved.

In *Starnes v. Schofield*, *supra*, this court impliedly recognized the rule here asserted. "Unless the amount of the attorney's fee is specified in the note, before the holder can recover, he is required to prove what a reasonable fee would be."

The appellee in this case was fully informed that the note was in the hands of the attorneys. He could not but know that it was in their hands for collection, because he was dealing with them and proposing to pay them the money. He was at this time represented by, and himself acting through attorneys. By the terms of his contract he had agreed to pay 5 per cent. attorney's fees. The appellee knew also that there was a controversy between the parties, and it is evident that the employment of attorneys by appellant was not a mere subterfuge to impose additional burdens upon the debtor. He knew, or ought to have known from the circumstances, that attorney's fees had been incurred and his liability therefor thereby fixed. If he thought 5 per cent. was too much he should have

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so shown. Since by fixing a rate in the contract he obtains the benefit of thereby limiting the amount he can be required to pay, even though the payee expends much more, we see nothing harsh or inequitable in declaring this to be *prima facie* the proper amount.

We are unable to perceive how any logical distinction can be made, as to this question, between cases where suit has been brought and those where there has been none. If the expense has actually been incurred by the holder, that fixes the liability, the amount of it being then determined in either instance according to settled rules of law.

Were we not right in this proposition that the rate specified must govern *prima facie*, then appellant was certainly entitled to the open and close. If, notwithstanding the provision in the note, he was required to prove the actual value of the attorney's fees, then the new trial should have been granted for refusing to give him the open and close, for the law is established in Indiana that whenever the plaintiff has any proof to make, either as to the facts necessary to establish a case or as to the amount of damages recoverable, he is entitled to the open and close. *Reynolds v. Baldwin*, 93 Ind. 57; *Hyatt v. Clements*, 65 Ind. 12; *Camp v. Brown*, 48 Ind. 575; *Fetters v. Muncie Nat'l Bank*, 34 Ind. 251.

Lindley v. Sullivan, 133 Ind. 588, does not sustain counsels' contention to the contrary. There the note did not specify the amount or rate of fees, but the answer expressly admitted plaintiff's right to the full amount of attorney's fees claimed in the complaint. This admission obviated the necessity of proof. Here there is no such admission.

We are not able to perceive how the debtor is exposed to great hardship by imposing upon him the duty of making inquiry as to the amount of the attor-

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ney's fees, and ascertaining them, especially, when he is dealing by his own attorneys with the creditor through his attorneys.

The Supreme Court of Vermont, in *Smith v. Wilbur*, 35 Vt. 133, passed upon a proposition closely analogous to this. There a tender is authorized after suit. It was made, but did not include certain costs of witnesses, and was held insufficient. The court says: "The fact that the plaintiff did not inform the defendant that he had summoned these witnesses was of no importance. If the defendant desired any information as to the amount of the plaintiff's costs from him, he should have inquired, for he knew a suit had been brought and some costs had accrued, and if he chose to make a tender without inquiry, the plaintiff certainly was not in fault."

It is not a new or novel doctrine that when one proposes to make to another a tender of the amount due him, he should take steps to ascertain the correct amount. In *Helphrey v. Chicago, etc., R. R. Co.*, 29 Ia. 480, the defendant relied upon a tender of the value of a colt which had been killed, and was adjudged by the jury to be worth \$60.00. The company had only tendered \$55.00. The court said: "If a party tender less than is due his creditor, he does so at his peril."

So, too, in this State, where one desires to tender damages under sections 6568, 6570, Burns' R. S. 1894 (4852, 4854, R. S. 1881), he must determine the proper amount and tender enough, if he would save himself from further costs.

If the holder of the note should refuse to give information concerning the attorney's fees when called for, or, should the debtor be ignorant of the employment of the attorney, or the tender be refused upon other grounds and he be thereby misled, the court would doubtless protect him, as was done in *Haskell v. Brewer*, 11 Me. 258, and *Nelson v. Robson*, 17 Minn. 284.

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That there may be no room for misunderstanding as to the evidence relating to tender we set it all out in full:

First. It was agreed that May 16, 1891, the defendant tendered plaintiff \$700.00, and kept this tender good by paying the money into court.

Second. There was the testimony of Howard Cale, who was connected with the office of Winter & Elam, May 16, 1891.

"Q. I will ask if you and Mr. Miller made any tender of money on account of this note to Judge Ayres, who had possession of the note as plaintiff's attorney? A. Yes, sir; we did.

Q. When was it? A. It was May 16, 1891.

Q. What was the amount of the tender? A. It was \$700.00.

Q. And Judge Ayres at the time had the note as plaintiff's attorney? A. Yes, sir.

Q. And they declined to receive it? A. Yes, sir."

Thus there is entire absence of any evidence as to the ground of the refusal of the tender, or as to what was said by the parties. The evidence discloses only that the tender was made and that it was declined. It does not show that any cause or reason whatever was assigned for such refusal, neither does it show that none was given. We might reasonably infer that one cause operating upon the minds of appellant and her counsel was the difference as to the \$600.00 credit; but there is not a word to indicate that this was the only reason, or that it was assigned by appellant's attorney as the basis or ground of the rejection.

There was no error in refusing to receive in evidence the page 80 of decedent's account book, if for no other reason, because there was, at that time, no proof that the entries were in decedent's handwriting, nor when they were made. Neither does it appear to us that

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they were necessarily parts of the same account introduced by appellee.

The law as to the introduction of account books is, in this State, in considerable confusion. *Wilber v. Scherer*, 13 Ind. App. 428. The page in question, however, does not seem to us really an account within the general acceptation of the term, kept in the regular course of business, but rather a mere memorandum. While it appears that Edward Mazelin wrote the indorsement reducing the interest, there is nothing to show that he was present when the agreement was made or had any actual knowledge of the consideration therefor.

Some other questions have been argued, but they may be easily obviated by amendment, or may not arise upon another trial. We do not, therefore, take them up.

Judgment reversed, with instructions to the trial court to grant a new trial.

REINHARD and LOTZ, JJ., dissent from that part of the opinion relating to attorney's fees.

ON PETITION FOR REHEARING.

GAVIN, J.—Impressed not only with the ability, but with the earnestness with which counsel for appellee urge their petition for rehearing we have endeavored to give to the questions involved that further consideration which they demand, but are still unable to accede to the correctness of the positions assumed by counsel.

The note in suit was dated in 1878, and was due in twelve months. December 8, 1880, the following endorsement was entered upon it. "Interest on this note reduced to 8 per cent. from date, and time extended while the interest is kept paid to the present amount."

It is now contended that by virtue of this endorse-

ment the time was so extended that the note was not due until appellee, by his tender, elected no longer to keep the loan, and that consequently no attorney fees chargeable to him could be incurred prior to such default.

It would be sufficient answer to this position to say that upon the original presentation of this cause no claim was advanced that by reason of this endorsement the debt was not due when the note went into the hands of Ayres & Jones, and that it is now too late for such contention to be heard. Passing that question and any others that might be raised as to the merits of this contention, and assuming that, as claimed by appellee, there was no default upon his part, and no maturing of the note so long as the interest was kept down to the amount then due, the time of the extension had long passed by, and the note matured by reason of his failure to keep the interest down to that sum.

According to the computation of appellee's counsel, attached to their original brief, the interest due December 8, 1880, was \$222.44. According to the same calculations the interest due July 31, 1886, was \$224.17, and the amount due April 15, 1887, was \$230.60.

Thus there was default in the payment of interest at least twice prior to the death of the decedent.

It is urged that since the evidence discloses but one subject of dispute prior to the tender, we should assume or infer that this was the only matter then in controversy. One objection to this position is that the evidence introduced does not purport to cover or include all that took place between the parties relative to the note before the tender. It shows, indeed, that there was a dispute about the \$600.00, but it does not show that the controversy was limited to that point.

Moreover, it does affirmatively appear that at the time of the trial there were other matters in dispute, notably, as to the rate of interest from its date to the time of the endorsement. So far as is made to appear by the evidence, the attorney's fees may have been specifically demanded at the time of the tender. It may be possible that such fact, if true, being within the knowledge of the appellant, the jury might, from his failure to so prove, have inferred the nonexistence of the fact; but counsel require of us that we should go much further and declare as a matter of law that this was the case. We do not feel authorized so to do.

It is further contended that, because the evidence discloses no other disputed matter at that time, we should conclude that no services were rendered save those touching the \$600.00 payment, and that the employment of the attorneys was limited to the adjustment of that matter alone. As to this proposition, like the other, the utmost which appellee could demand would be that the jury might thus conclude, while to sustain appellee's position we must declare that this is the only inference fairly deducible from all the facts and circumstances of the case. We are, however, of opinion that it was at least fairly inferable that the note was in attorney's hands generally for collection.

That, under the facts of this case, the insufficiency of the amount of the tender was not waived, we still think clear. In each of the cases cited to sustain the opposite contention (where the question involved was one of tender), save *Lambert v. Miller*, 38 N. J. Eq. 117, it was held that some objection to the tender was waived because the party had placed his refusal to accept it upon some other ground, or had done some act which prevented a formal and proper tender.

Here, the evidence is wholly silent as to whether or
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not any reason for the refusal was given. It simply shows that the offer of so much money was made and the offer declined.

Appellant is not shown to have done anything to mislead appellee or throw him off his guard; so far as appears, they were dealing with one another at arm's length, each one upon his guard and each one standing upon his legal rights. If any different state of facts existed the evidence has not been produced to establish it.

Petition overruled.

DISSENTING OPINION.

REINHARD, J.—I am wholly unable to agree with my brethren of the majority upon the rule of law enunciated in the prevailing opinion, concerning the question of fees for plaintiff's attorney, the payment of which is stipulated for in a promissory note or other contract by the maker thereof.

Under the decisions in this State, cited in the opinion of the majority, attorney's fees are given by reason of the stipulation in the contract as an indemnity to the plaintiff for money paid by him or for which he has become liable, and he is not entitled to judgment for such fees unless an attorney was, of necessity, employed to collect the debt. *Judson v. Romaine*, 8 Ind. App. 390. I very much doubt whether a plaintiff can recover such fees at all unless suit is actually brought upon the obligation in which the promise to pay such fee is contained. Originally in this State the validity of the agreement to pay the fee always depended upon the express condition that a suit be brought upon the instrument. Later the statute was enacted providing that no attorney's fee shall be collected that depends upon any condition set forth in the contract. See *Churchman v. Martin*, 54 Ind. 380.

In no instance is it conceivable how a fee can rightfully be collected by the plaintiff without an implied condition that services be rendered by an attorney in connection with the collection of the note. But while there is such an implied condition in every such promise to pay attorney's fees, it is held by the Supreme Court that this condition must not be expressed in the contract, or the promise is void under the statute. It was generally understood at the time the statute referred to was enacted, that it was intended to do away with the making of such contracts entirely; but according to the views of the Supreme Court, this intention was not so expressed as to become operative. But if it was not intended to do away with such contracts entirely, it certainly cannot be held that the enactment of the statute in question was intended as an enlargement of the scope of the rule by which such fees were collectible and to extend it to cases in which the right did not before exist. And yet, the effect of the holding of the principal opinion, as it appears to me, will be to greatly extend the right of collecting such fees instead of curtailing it.

Assuming, however, that attorney's fees may be collected, even when no suit has been brought, I still think the burden rests upon the plaintiff to prove, before he can recover fees claimed to have accrued before suit, that he had employed an attorney, that the latter had rendered some services, and what such services were worth. The rule that when the note provides for the payment of a certain per cent. of the principal sum, such per cent. is *prima facie* the correct amount due on account of such fees, is not applicable, in my judgment, to fees accrued before suit. How could the maker of the note, if such were the rule, ever know what amount to tender to the holder of the note for his attorney's fee? How could he know

what the proper amount of the fee was? Or, is he required by the law to go to the holder and obtain that information? That the rule referred to is correct only when applied to fees charged for services rendered after suit or in connection therewith, I think is clear. In that case the court can take judicial notice that the attorney has rendered the services because it sees him in the performance thereof. The mere fact that the note is in the hands of an attorney for collection is only *prima facie* evidence, at best, that some legal services have been rendered. It furnishes no measure by which the value of the services can be judged. In my view of the law, the plaintiff has not overcome the presumption against him on the question of attorney's fees until he has shown what services were rendered and the value of the same. When the debtor goes to the plaintiff or his attorney to discharge his obligation, he is not ordinarily presumed to know that there is an attorney's fee due on the same, and even if he were, he cannot be held to know the value thereof. If such services have been rendered, the plaintiff or holder of the note is in a far better position to know that fact, and to know the value of the services, than is the debtor, and common honesty and fair dealing require that if the payee or holder of the instrument has any such claim, that he assert it when a tender is made of the amount supposed to be due. If nothing is said by the parties at the time of such tender about attorney's fees, and the tender is refused upon other grounds, or is refused without assigning any reason, I think the plaintiff must fail in the recovery of such fees. I think it is against the plainest principles of public policy and natural justice to hold that a debtor must ascertain at his peril whether or not anything is due from him for counsel fees before suit is brought, and, if so, how much. *Prima facie*, the holder of the

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note is not entitled to collect such fees, and not at all unless liability for the same has been incurred, and if that is the case, he must inform the debtor thereof, and also of the amount claimed by him before he can put him in default.

If the logic of the majority opinion be correct, the debtor can be required to pay the attorney fee, whether he has any notice that the instrument is in the hands of an attorney for collection or not. Suppose a note due on a certain day is, immediately after maturity, placed in the hands of an attorney for collection. The payer goes to the holder to liquidate it. The latter, however, refuses to accept the principal and interest, but gives no reason for such refusal. Now, if the principal opinion be correct, the debtor is bound to know at his peril that the note has been placed in the hands of an attorney for collection, and that there is due a certain amount from him as a fee for such services, and he must make the holder of the note a tender therefor, being sure to tender enough, or be subject to the payment of costs. If, as in the present case, the amount stipulated be 5 per cent. of the principal and interest due, then the debtor must tender that amount for such fees, unless he can make a correct guess of the value of such services, if the sum be less than 5 per cent. I do not believe an interpretation should be adopted which would lead to such a result.

We are dealing here with a system and not a single case merely, and the question is, whether the court shall by judicial construction still further enlarge the right of the plaintiffs to collect counsel fees in cases in which the plain letter and spirit of the law do not require it, or whether we shall construe the law strictly as against further enlargement of such right, and thereby, at least, place some check upon the abuse to which the system is subjected. I for one am not

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willing to go further in the construction of the law in question than our courts have already gone, unless the Supreme Court by its future decisions makes it obligatory upon us to do so.

In the present case there was not a particle of evidence as to the amount expended for attorney's fees or the value thereof, nor was there a word said to the appellee when the tender was made as to any attorney's fees being due. Under these circumstances, the appellant cannot question the sufficiency of the tender; and the instructions given by the court state the law correctly.

For these reasons, I respectfully dissent from that portion of the principal opinion which relates to the question of attorney's fees.

LOTZ, J.—I concur in the opinion of REINHARD, J.

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[No. 1,994. Filed Sept. 25, 1896. Rehearing denied Dec. 30, 1896.]

COMPLAINT.—*Negligence.—Proximate Cause.—Sufficiency of Averments of Negligence Constituting the Proximate Cause of the Injury.—Death by Natural Gas Explosion.*—A complaint against a natural gas company which avers that defendant negligently and knowingly suffered its pipe lines to become rusted and rotten and incapable of controlling and retaining the natural gas thereby conveyed, and continued to use such pipes for the purpose of conveying gas when it knew same to be in such defective condition, and that by reason of such negligence one of its pipes sprung a leak at a point in front of the building in which plaintiff's intestate was engaged in working and permitted gas to escape and be discharged into the earth through which it permeated and found its way, accumulating in large quantities beneath and into the said building, and exploding when it came in contact with fire, by force of which explosion such building was blown down, causing the death of plaintiff's intestate, sufficiently charges that defendant's negligence was the proximate cause of the death of plaintiff's intestate. *pp. 537-540.*

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EVIDENCE.—*Judicial Notice.*—*Explosive Quality of Natural Gas.*—

Courts know judicially that natural gas is highly explosive and combustible, and that it will explode when ignited by fire. p. 540.

NATURAL GAS.—*Duty of Natural Gas Companies.*—It is the duty of a natural gas company to so operate its pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. p. 540.

COMPLAINT.—*Negligence.*—*Necessary Averments as to Freedom from Fault.*—In an action for damages based upon the negligence of defendant, a general averment of freedom from negligence on part of plaintiff is sufficient, unless the court can say from the facts pleaded, as a matter of law, that plaintiff contributed to his injury. pp. 541, 542.

PROXIMATE CAUSE.—*Escape of Natural Gas.*—*Defective Gas Pipes.*

—The bursting of a pipe line used to convey natural gas, the escape of gas therefrom, and the penetration thereof through the earth beneath and into a building adjacent thereto, were the natural and proximate results of the use of weak and inferior gas pipes and allowing gas to flow into them at a high and dangerous pressure. pp. 542-545.

SAME.—*Negligence May be the Proximate Cause Although not the Immediate Cause.*—The negligence of the defendant must be the proximate cause of the injury, and it is the proximate cause thereof if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient intervening cause. The negligence charged may be the proximate cause, although not the immediate one; it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury. p. 546.

VERDICT.—*Special Verdict Must Contain a Finding of Every Ultimate Fact.*—*Evidentiary Facts Disregarded.*—A special verdict must contain a finding of every ultimate fact necessary to a recovery before a judgment rendered upon it will stand; evidentiary facts and facts beyond the issues must be disregarded and nothing will be taken by intendment. pp. 546, 547.

NATURAL GAS COMPANIES.—*Failure to Test Pipes.*—*Statute Construed.*—Under the provisions of section 7507, Burns' R. S. 1894, et seq., that natural gas companies shall conduct gas only through sound wrought, or cast iron pipes and casings, tested to a pressure of at least 400 pounds to the square inch, and that such companies shall not convey natural gas through such pipes and casings at a pressure exceeding 300 pounds per square inch, the failure of such company to test its pipes to a pressure of at least 300 pounds is in violation of said statute and such company is thereby guilty of negligence for which it is answerable in damages for all resulting injuries. p. 548.

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VERDICT.—*Variance Between Special Verdict and Pleading.*—In an action against a natural gas company for death caused by an explosion of natural gas which had escaped from the company's pipes in the street, an averment in the complaint that the house in which the explosion occurred was located on the west side of the street and a finding in the special verdict that such house was on the east side of the street do not constitute a material variance. p. 549.

SAME.—*Knowledge on Part of Injured Party of Danger.*—*Gas Escaping from Pipes.*—*Death from Explosion of Natural Gas.*—A special verdict in an action against a natural gas company for the death of plaintiff's intestate resulting from an explosion of natural gas in a building occupied by intestate as a barber shop, which shows that the deceased was lawfully occupying such building, and which fairly discloses that deceased was free from fault, need not find that deceased had no knowledge of the dangerous and defective condition of defendant's pipe lines and did not know that the same had burst and gas was escaping therefrom. p. 550.

SAME.—*Special Verdict.*—*Not Necessary That Verdict Show Date of Death of Deceased.*—Where there was no issue as to the operation of any statute of limitations, it is immaterial that a special verdict does not show with certainty that the death of plaintiff's intestate, for which suit was brought, did not occur on the day alleged in the complaint. p. 550.

WITNESS.—*Competency of Widow of Deceased.*—The widow may testify as a witness in an action brought by the administrator for the negligent killing of her husband. p. 553.

EVIDENCE.—*Natural Gas Explosion.*—*Defective Pipes.*—*Practice.*—In an action against a natural gas company for death caused by an explosion of gas escaping from its pipe in the street by reason of alleged defects in such pipe at a certain point, evidence of defects in such pipe line at other points, although not discovered until after such explosion, was admissible as tending to show that the condition of the pipe at the time of the examination, or when the condition was observed, was such as to indicate that the defects had existed prior to the time of the injury complained of. pp. 553, 554.

SAME.—*Natural Gas Explosion.*—*Practice.*—When the gas company introduces evidence of an explosion subsequent to the one for which it is sought to be held responsible, it cannot question the competency of other evidence as to such explosion, introduced for the purpose of showing the condition of the pipe at the time of the explosion in question, although the evidence introduced by it was for another purpose. p. 554.

SAME.—*Natural Gas Explosion.*—*Notice of Unsafe Condition of Pipes.*—As tending to prove notice to a natural gas company of the unsafe condition of its pipe line, in an action for death resulting

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from an explosion of gas escaping from its pipes, it was proper for plaintiff to show by the mayor of the city in which the lines were located that before the explosion he informed one of defendant's men, who had control of the line, of the unsafe condition of the pipes and that he thought the high pressure line should be taken up. *p. 554.*

From the Tipton Circuit Court. *Affirmed.*

W. A. Kittinger, E. D. Reardon, A. C. Carver, E. G. Ballard, E. B. McMahan and W. S. Diven, for appellant.

W. F. Edwards, C. K. Bagot and T. Bagot, for appellee,

REINHARD, J.—This action was instituted by the appellee against the appellant, in the Madison Circuit Court, to recover damages on account of the death of the appellee's intestate, through the alleged negligence of the appellant. The venue of the cause was changed to the Tipton Circuit Court where there was a trial by jury and a special verdict, upon which the court rendered judgment in favor of appellee for \$3,250.00.

The complaint is in four paragraphs and to each of these a demurrer was filed and overruled, which ruling is assigned as error. The special verdict discloses that it is not founded upon the averments of the third paragraph of the complaint, and, hence, that paragraph may be treated as being out of the case.

The first paragraph of the complaint alleges, among other things, that the defendant was and is a corporation, organized and existing under the laws of the State of Indiana, for the purpose and object of digging, boring and drilling for natural gas and furnishing the same for fuel and light for hire to the general public, and with its principal office and plant in said city of Alexandria, Indiana; and that on the 31st day of March, 1894, and long prior thereto, the said de-

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defendant corporation had, owned and operated, for use in its said business in and about said city of Alexandria, a large number of natural gas wells from which the said natural gas used in its said business was supplied; and that for the purpose and object of furnishing gas to its consumers, the corporation owned and operated a system of underground pipe lines connected with its wells and extending through and upon the streets of said city; "that two of said pipe lines ran and extended through, upon and along Canal street in said city; and upon the west side of said Canal street there was a brick block or building, known as the F. N. Whitesides Block, and that said pipe line was extended and passed in front of said building at a distance of about thirty-one feet from the front and east side of said building."

Said paragraph further alleges that on the 31st day of March, and prior thereto, the defendant had negligently and carelessly and knowingly permitted and allowed its said pipe lines to become and remain in bad repair, and had negligently and carelessly permitted the pipe lines in front of said building to become rusted, rotten and incapable of controlling and retaining the natural gas contained therein and conveyed thereby, and permitted the same to become and remain in an unsafe and dangerous condition, and in so continuing to use the same as aforesaid; that the defendant at the time and long prior to the 31st day of March, 1894, had full knowledge and notice of the rusted, rotten and unsafe and dangerous condition of said pipe lines at said point; and that said decedent was twenty-seven years old, and left surviving him his widow and one child, a girl of the age of seven years, both of whom were dependent upon him for maintenance and support, and are still living; "that on the --- day of May, 1895, this plaintiff was duly ap-

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pointed by the Madison Circuit Court, administrator of the estate of said decedent; and that by reason of the death of said decedent as aforesaid, the said widow and child were damaged in the sum of ten thousand dollars."

It is contended by appellant's counsel that this pleading is insufficient, because it contains "no averment of any negligence on the part of the appellant as to acts that were the proximate cause of death: *i. e.*, there is no averment of negligence in appellant, either by general averment or by averring directly that appellant had knowledge that its pipe line had sprung a leak on Canal street, or that it knew gas was escaping and percolating the earth; or that it is chargeable with knowledge that its main sprung a leak, gas escaped and traveled four feet to a building and under the walls of the building, etc. And no charge of any negligence in appellant in such gas coming in contact with fire," etc.

In this contention we think counsel are in error. The averment is sufficiently plain and certain that the appellant negligently and knowingly suffered its pipe lines to become rusted and rotten and incapable of controlling and retaining the natural gas contained therein and conveyed thereby, and continued to use said pipes for the purpose of conveying gas therein when it knew them to be in such defective condition, and that by reason of such carelessness and negligence one of said pipes, on the 31st day of March, 1894, broke and sprung a leak at a point in front of the building in which appellee's intestate was engaged in working, at his usual occupation, and permitted the gas to escape and be discharged into the earth which it permeated and found its way through, accumulating in large quantities beneath and in the said building, and exploding when it came in contact with fire,

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by force of which explosion said building was shattered, blown down, and totally wrecked and destroyed, causing the appellee's intestate to be buried beneath the debris and to be burned by the fire which immediately followed the said explosion, and to be injured, from the effects of which he then and there died.

The proximate cause of the death of appellee's intestate is here charged to be the negligence of the appellant in knowingly permitting its pipes to become defective and out of order, in consequence of which, a leak was sprung, thus allowing the gas to escape and explode when coming in contact with fire.

Courts know judicially that natural gas is highly explosive and combustible, and that it will explode when ignited by fire. *Indiana Natural Gas and Oil Co. v. Jones*, 14 Ind. App. 55, and cases cited. And it was the duty of the appellant to so operate its pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. *Missis-sinewa Mining Co. v. Patton*, 129 Ind. 472, 27 Am. St. 203.

The complaint discloses a clear violation of the duty mentioned, and if such violation of duty is shown to have been the proximate cause of the death of appellee's intestate, the appellant is liable. *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335, 49 Am. St. 199, 29 L. R. A. 355.

It is not shown how there happened to be any fire at the point where the explosion occurred, nor the manner in which it took place, and it may be argued with some degree of plausibility that there might have been some intervening agency for which the appellant was not responsible, which was the more immediate cause of the explosion. See *McGahan v. Indianapolis Natural Gas Co.*, *supra*. But the place where the gas is charged to have come in contact with the fire is

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shown to have been in or about the building in which the deceased was engaged in his daily business,—a place where fire is used for illuminating, and other purposes, constantly, and the explosion by such means was one of the results which the appellant was bound to anticipate in the operation of its gas mains. The complaint might be subject to a motion to make more specific in this regard, but we think it is sufficient to withstand the demurrer.

In *Mississinewa Mining Co. v. Patton*, *supra*, the complaint charged that the escaping gas came in contact with a lighted lamp in the dwelling house, and, without plaintiff's fault, exploded and set fire to and destroyed plaintiff's building and contents, without showing how the lamp came to be lighted, or other particulars indicating the absence of any intervening agency, but the complaint was held sufficient by the Supreme Court.

It was not necessary to aver that appellant knew that gas was escaping from the broken pipes and percolating through the ground to the place of the explosion. If the appellant had knowledge of the imperfect condition of the pipes, as charged, it was bound to know also that gas would escape. This was one of the natural results of the appellant's negligence and for these, it is responsible.

It is next insisted that the pleading is fatally defective in failing to charge that the appellee was free from contributory fault. It is averred generally that the appellee's intestate, by reason of the negligent acts of the appellant of knowingly allowing its pipe lines to become rotten and broken and out of order, whereby the gas escaped and the explosion followed, the intestate was injured, and that he died from the effects of his injuries, and that all this happened and took place "without any fault or negligence on his

part." This was sufficient. It is a well settled rule of pleading in this State, in cases of negligence, that a general averment of freedom from negligence is sufficient, unless the court can say from the facts pleaded, as a matter of law, that the plaintiff contributed to his injury. *Evansville, etc., R. R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. 303.

The averment that plaintiff was without fault has a technical signification, and entitles the plaintiff to make proof of any facts tending to show its truth. *Chicago, etc., R. R. Co. v. Nash*, 1 Ind. App. 298; *Town of Salem v. Goller*, 76 Ind. 291; *Pittsburgh, etc., R. W. Co. v. Wright*, 80 Ind. 182; *Pittsburgh, etc., R. W. Co. v. Burton, Admx.*, 139 Ind. 357; *Citizens, St. R. R. Co. v. Spahr*, 7 Ind. App. 23.

The cases cited by appellant's counsel do not sustain their contention. The case of *Stewart, Admx., v. Pennsylvania Co.*, 130 Ind. 242, cited by counsel, is expressly against the proposition. It was there held that a general averment that plaintiff "was without fault or negligence in all said matter, had acted with prudence and with care in all said transactions," was sufficient as an averment of freedom from contributory negligence, unless the facts specifically pleaded show that he was guilty of such negligence, and because the specific averment did show negligence, the complaint was held bad.

The demurrer to the first paragraph was properly overruled. The second paragraph of the complaint, or that portion charging the negligence of appellant, and freedom from negligence of appellee's intestate, is as follows:

"That on said 31st day of March, 1894, and long prior thereto, the pipe line used and employed by said defendant corporation in said pipe lines on Canal street, and in front of said building, was weak and in-

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sufficient and inferior in quality, and incapable of retaining, carrying and conveying natural gas without hazarding the safety of the public, and endangering the lives and property of the people in and about the locality of said pipe lines. That the defendant at said time had full notice and knowledge of the said facts, and negligently and carelessly used and employed said pipe line to carry and convey said natural gas to its consumers and patrons, and there carelessly and negligently, with full knowledge of the insufficiency and weakness of said pipe lines, and the danger to the public in consequence thereof, turned into and permitted to flow in and through said pipe lines said natural gas from said wells, at a very high and dangerous pressure, far beyond the retaining power and strength of said pipe line. That by reason of said negligence and carelessness of the defendant corporation in using and employing such weak and inferior pipe, and its negligence and carelessness in permitting and allowing said natural gas to flow in and through said pipe lines, at said high and dangerous pressure, the said pipe line at a point in front of said building, on or before the 31st day of March, 1894, broke, burst and gave away and permitted the gas to escape from said pipe line in large quantities into the earth surrounding the same, and that said gas so escaping from said pipe line, permeated the earth, and percolated and found its way through the same, and gathered and accumulated in large quantities beneath said building, and in said building occupied by the American Express Company and the decedent, where the same came in contact with fire and exploded with great force. And that by the force of said explosion, said building was shattered, blown down and totally destroyed, and the debris thereof set on fire by the gas thus ignited. And at the time of the said explosion,

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plaintiff's decedent, Jesse D. Harrold, occupied a room in said building adjoining the room occupied by said American Express Company; and that he was a barber by trade and used said room occupied by him as a barber shop, and was, at the time of the said explosion, rightfully in said room pursuing the work and duties of said trade; and that by the force of said explosion, and the falling of said building, he was knocked down, injured, buried and held fast by the ruins and debris of said building, and burned by the fire which immediately followed said explosion; by reason of said injuries, so received, he then and there died, all without any fault or negligence on his part. And that said explosion, the falling of said building, the fire which followed, and the injuries and death of said decedent, were all caused, brought about and produced directly and immediately by said negligence and carelessness of the said defendant corporation so using and employing said weak and insufficient pipe, and in permitting and allowing said gas so to flow in and through the same at the high and dangerous pressure as aforesaid."

This paragraph, it will be seen, differs from the first, mainly, in counting upon the alleged negligence of the appellant in knowingly using weak and inferior gas pipes and allowing the gas to flow into them at a high and dangerous pressure; while in the first paragraph the gist of the negligence is in knowingly using and continuing to use rotten and defective pipes,—pipes that were out of repair and that had become so, presumably, by use. This paragraph is not open to the objection that it fails to bring home to the appellant knowledge or notice of the danger of an explosion. If appellant knew that the pipes were defective and "of an inferior quality, and incapable of retaining and carrying natural gas without hazarding the safety of

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the public and endangering the lives and property of the people in and about the locality of said pipe line," as alleged, it was bound to know, also, that there would be danger of an explosion, and it plainly violated a duty devolving upon it, by the use of such pipes, not to speak of the further averment that appellant "with full knowledge of the insufficiency of such pipe line, and the danger to the public and community in consequence thereof, turned into and permitted to flow in and through said pipe line said natural gas from its said wells at a very high and dangerous pressure, far beyond the retaining power and strength of said pipes." There is no merit in the contention that there is no charge of negligence "in the breaking and bursting of the pipe line, in the escaping of the gas, in the percolating of it through the earth, and of its finding its way beneath said building and in said building." The appellant was bound to know that these consequences would probably follow, if they did follow, the use of the defective pipes and the turning on of the gas at the excessive pressure. They were but the natural and ordinary results of its carelessness, and it would be a most extraordinary rule that would require the plaintiff to charge in his complaint, in such a case, that the gas company had special knowledge or notice of the happening of each consequence flowing from its original negligence, in the order in which it occurred. No principle is better settled than the one that every person who is *sui juris* is presumed to know and in duty bound to anticipate the natural and usual consequences flowing from his unlawful acts or omissions. The only serious trouble that sometimes arises in the application of this principle is in determining whether or not a given result may be said to be such a natural and ordinary one as to be properly chargea-

ble to the defendant's negligent act or omission, and this is what has given rise to the doctrine of proximate cause. The negligence of the defendant must be the proximate cause of the injury, and it is the proximate cause thereof, if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient intervening cause. The negligence charged may be the proximate cause, although not the immediate one; it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury. *Reid v. Evansville, etc., R. R. Co.*, 10 Ind. App. 385, 53 Am. St. 391; *Louisville, etc., Co. v. Nolan*, 135 Ind. 60; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 39 Am. St. 251.

We regard this paragraph as sufficient to charge the appellant with negligence.

We also think it contains a sufficient averment of appellee's freedom from contributory fault. What we have said respecting the first paragraph is applicable here also.

The fourth paragraph of complaint is complained of as being subject to the demurrer addressed to it. The grounds of objection urged to this paragraph are much the same as those presented in reference to the first and second paragraphs; and without here setting forth the pleading, we must content ourselves with stating, as a result of our examination, that the court did not err in overruling the demurrer to it.

It is next insisted that the special verdict was insufficient to authorize the trial court to render judgment upon it, and that, therefore, the court erred in overruling appellant's motion for a judgment in its favor and in sustaining appellee's motion for a judgment in his favor.

The objections urged by counsel to the special ver-

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dict are in substance that when stripped of all findings of mere conclusions of law and of facts outside of the issues, not enough remains in the verdict upon which a judgment can be properly based.

It may be conceded that a special verdict must contain a finding of every ultimate fact necessary to a recovery, before a judgment rendered upon it will stand; and that mere conclusions, evidentiary facts and facts beyond the issues must be disregarded, and that nothing will be taken by intendment. *City of Bloomington v. Rogers*, 9 Ind. App. 230; *Walkup v. May*, 9 Ind. App. 409; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

We have carefully read the verdict and have considered the numerous objections pointed out by the appellant's counsel. Our conclusion is that although it contains some legal conclusions and some mere evidentiary facts, there are enough ultimate facts found to warrant the court in pronouncing judgment upon it. It is proper to say, however, that some of the findings which counsel treat as mere legal conclusions are not such, in our view. The verdict discloses with sufficient certainty that the appellant operated a natural gas plant in the city of Alexandria; that the pipes used for conveying gas from the gas wells to consumers' houses were, on the 31st day of March, 1894, and for a long time prior thereto, rotten, decayed, rusted, and unworthy, and unsafe to carry and control natural gas at high pressure, as the appellant then and there well knew; that said pipe was of a weak and inferior quality, and unfit and unsafe to retain or control natural gas at a high pressure, as appellant then and for a long time prior thereto well knew; that by reason of the conditions named, the said pipes leaked at different points along the line for a long period of time prior to March 31, 1894; that at no time prior to said date

did the appellant subject the pipes, etc., to an examination, or make the same stand a test, to exceed one hundred pounds to the square inch; that appellant, with a knowledge of such condition, allowed natural gas to pass through said lines at a pressure beyond the power and capacity of said pipes, during a period of more than one year prior to said date; that on or before the date mentioned the pipes burst, broke and gave way, and allowed natural gas contained therein to escape from the pipes into the earth surrounding such pipes, and to permeate the same and percolate through the ground and beneath the foundation and building in which the intestate was engaged in the business of a barber; that on said day the escaping gas at said point came in contact with fire in said building and there was an explosion therefrom, which wrecked the building and killed said intestate, etc.

Doubtless the gist of the negligence here found is in allowing the pipes to become rotten and unsafe, without inspection, and without replacing them with others. There is no merit in appellant's point that it was not required to test the pipe to a pressure exceeding one hundred pounds to the square inch. The statute expressly provides that gas companies shall be in duty bound to conduct natural gas only through sound wrought, or cast iron pipes and casings, tested to a pressure of at least four hundred pounds to the square inch; and that such companies shall not convey natural gas through such pipes and casings at a pressure exceeding three hundred pounds per square inch. Section 7507, Burns' R. S. 1894, *et seq*; *Indiana Natural Gas and Oil Co. v. Jones, supra*.

Hence, if the appellant, prior to said explosion, failed to test its pipes to a pressure of at least three hundred pounds, it violated the statute referred to and was

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guilty of negligence, for which it is answerable in damages for all resulting injury.

Nor do we think there is a material variance between the verdict and the pleadings in that "the Whitesides Block" (the building in which the explosion occurred), is located in the special verdict on the east side of Court street, while the complaint describes said block as being on the west side of said street. The variance, if such it may be called, is clearly immaterial and unimportant. If the complaint was wrong in this description, it could have been amended on motion and will be regarded as having been so amended, on appeal. If the verdict contains the erroneous location, however, it is evident that it was a mere clerical error, and one which could not have been of the slightest injury to the appellant.

The case of *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275, lends no support to appellant's contention upon this point. In that case the complaint proceeded upon the theory of negligence in the railway company allowing rubbish and other combustible material to accumulate on its right of way, while the special verdict showed a case of negligence arising from the use of an engine not provided with a proper spark arrester. The case cited only reiterates what had long been the rule of law, viz.: that every complaint must proceed upon a definite theory, and that a verdict based upon another theory cannot be sustained. The variance there, was in the gist of the negligence itself. The complaint charged negligence in one thing, while the special verdict found negligence in another. Not so in the present case. Here the negligence charged and found is one and the same matter. The building blown up and in which the accident happened was the Whitesides Block, and whether it was located on the east or west side of the street was wholly immaterial, and the ap-

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pellant could not have been misled by the statement contained in the complaint as to the location of such building, even if the statement was not true.

Nor was it necessary that the verdict should find that the deceased had no knowledge of the dangerous, defective or unsafe condition of the pipe line, and that the same had burst and gas was escaping therefrom, although the verdict does find these facts, as we think, clearly enough. Upon the whole, the verdict fairly discloses that the deceased was free from fault. He was lawfully occupying a room in this building and was in the ordinary pursuit of his business, viz., that of a barber, when the explosion occurred, which resulted in his death. Whatever light or fire there was burning in the barber shop or in the other parts of the building was there legitimately as we must presume, and was a matter to be anticipated in the transportation of gas. There is no indication from anything found in the verdict that the deceased was, in any particular, to blame for his death, while the fact that he was free from fault is fairly inferable therefrom.

We think it appears with sufficient certainty in the special verdict that the explosion and death occurred on the 31st day of March, 1894; but if appellant's version is correct that the finding is uncertain in this respect, it is not material. There was no issue as to the operation of any statute of limitation, and time, therefore, was of little or no consequence. The verdict shows that there was an explosion from the effects of leakages of defective gas pipes, which resulted in the death of appellee's intestate, and that appellant was chargeable with knowledge of the defects in such pipes.

There was no error in the court's rulings upon the special verdict.

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The appellant has assigned as error the overruling of its motion for a new trial. It is insisted in this connection that the evidence fails to support the verdict in several important particulars. We have examined the evidence and find the appellant's position untenable. There is evidence on every material point which fully sustains the verdict. True, it is largely circumstantial, but its probative force is not thereby impaired. It was a matter for the determination of the jury.

The evidence tends to show that the material in the gas pipes was of a very inferior quality. The high pressure line leaked in several places in 1893, and an examination in that year showed the pipes to be rotten and gas escaping in considerable quantities and the earth blackened from escaping gas along the line. Appellant was notified in that year by the mayor of the city that the line was unsafe and was requested to replace it with another. In October, 1893, the appellant's superintendent made an examination, and when the earth was removed it was found that gas was escaping, and the pipe was corroded and leaking. He endeavored to stop the leaks but was unable to do so. The appellant, with a full knowledge of these facts, and having been warned of the danger, continued the use of the line and permitted the gas, at high pressure, to pass through it. The main pipe was thirty inches below the surface of the macadamized streets, and in one place about forty feet from the building where the explosion occurred, in which there was an express office and the barber shop of the deceased. No explosive material of any kind was used or stored in or about the building, except the natural gas. After the explosion there was an examination made and it was found that gas had found its way to the foundation, from the main in the street, in

considerable quantities. The service pipe leading from the main to the building was tested and found to be sound, so that gas could not have escaped from it. Upon continuing the investigation to the sidewalk and beneath it, the earth was found blackened from what appeared to be escaping gas, and when fire was applied it readily ignited and continued to burn for some time. A few weeks afterward the vegetation all around this place began to die. There was a strong odor of gas and a discoloration of the earth for some distance about this point. A considerable leak was detected almost directly opposite the building referred to. There were no other gas pipes in the vicinity. Experts testified that the leak had probably been there for a year. Appellant, after the explosion, attempted to trace the leak, and its servants dug four or five feet from the building in the direction of the main, finding the earth black and charged with gas as far as they went, evidently coming from the direction of the pipe line, when appellant ceased further investigation. The explosion was such as to justify the belief that it came from natural gas. The appellant was informed of the dangerous condition of the pipe line six months before the explosion, but no effort was made to repair or place it in safe condition. Witnesses who were competent experts testified, that when gas escapes into the earth beneath the crusted surface of a street, it will go in the direction in which it finds the least resistance, forcing its way through the earth until it escapes, and that it tends to expand until exhausted and then it accumulates, or tends to do so, beneath buildings and in cellars and low places, and that there is no limit to the distance it may travel through the ground in the way of least resistance. There was no odor of gas in the barber shop and the

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lights were burning as usual, a few hours before the explosion.

From these and other facts proved or testified to by witnesses, the jury had the undoubted right to conclude that the explosion was the result of the defective gas pipes, and we cannot disturb the verdict on the evidence. As to the question of contributory negligence on the part of the deceased, it is clearly shown that he was in the pursuit of his usual occupation and did nothing which directly or indirectly contributed to the disastrous result which followed appellant's carelessness in the operation of its pipe lines.

It is next insisted that the court erred in permitting the widow of the deceased, by whose administrator this action is prosecuted, to testify as a witness for the appellee. There was no error in this. *Louisville, etc., R. W. Co. v. Thompson, Admr.*, 107 Ind. 442, 57 Am. Rep. 120.

Error is predicated upon the ruling of the court in admitting the testimony of John E. Sherman, the mayor of Alexandria, as to a leak in appellant's mains at a point other than that from which the gas claimed to have caused the explosion must have come, and (as appellant insists) at a time subsequent to the explosion in which appellee's decedent was killed. The evidence was conflicting as to whether the discovery of the leak was before or after the explosion. The defective pipe was a part of the same line through which gas was conducted to the building in which the explosion occurred and this evidence tended to show its general condition. There was no error in the ruling.

Other testimony was admitted, over appellant's objection and exception, tending to show the condition of this pipe line prior to the accident. Some of these defects were not noticed until after the explosion, it

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is true, but the evidence was such as to warrant a legitimate inference that they existed long before. The testimony was competent only upon the theory that the condition of the pipe at the time of the examination, or when the defect was observed, was such as to indicate that the defects had existed prior to the time of the injury complained of. *City of Indianapolis v. Scott*, 72 Ind. 196; *Pennsylvania Co. v. Marion*, 104 Ind. 239.

For a similar reason, it was not improper to show that there was an explosion in this line in September, 1894. Besides, the appellant itself introduced evidence on this subject, of another explosion, at a different time. It is, therefore, estopped to question its competency. *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449.

It was proper for appellee to prove by the witness, Sherman, that before the explosion, he informed one of appellant's men, who had control of the line, of the unsafe condition of the pipes and that he thought the high pressure line should be taken up. It tended to prove notice to the appellant of the unsafe condition of the line.

Other minor questions are presented, but they all go to the points already determined, regarding the admissibility of evidence of defects discovered after the injury. It is sufficient to say that we do not think any substantial error was committed by the court in any of its rulings upon the testimony.

We have carefully examined into all the questions raised in the record and have discovered no prejudicial error.

Judgment affirmed.

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THE STATE, EX REL. KREBS v. GRIFFIN ET AL.

[No. 1,961. Filed January 18, 1897.]

CHATTEL MORTGAGE.—*Must be Recorded in County Where Mortgagors Reside.*—Under section 6638, Burns' R. S. 1894, a chattel mortgage to be valid, as to persons not parties thereto, must be recorded in the county where the mortgagors reside, and within ten days after its execution.

SAME.—*Residence of Mortgagors.*—*Burden of Proof.*—Where in an action against a constable and his bondsmen it is charged that such constable levied execution on, and sold certain personal property that was covered by mortgage, the burden of proof is on the plaintiff to show that the mortgagors reside in the county where the mortgage was recorded.

SPECIAL VERDICT.—*Residence of Mortgagors.*—A special verdict which makes no finding as to the residence of the mortgagors of a chattel mortgage, except the recitals in the mortgage, a copy of which mortgage is set out in the finding, does not sufficiently find the fact of such residence, so as to bind others than the parties thereto.

From the Cass Circuit Court. *Affirmed.*

John C. Nelson and Quincy A. Myers, for appellant.

M. Winfield, for appellees.

COMSTOCK, C. J.—This is an action brought in the Cass Circuit Court, in the name of the State of Indiana, for the use of Ferdinand Krebs, appellant, against Edward Griffin, a constable, and John Dunn, his bondsman, appellees. A special verdict was returned by the jury, and upon motion of appellees the court rendered judgment in their favor upon the verdict, and overruled the motion for judgment of the appellant.

Several paragraphs of answer, one of which was a general denial, were filed by appellees, but no exception is urged to the ruling of the court upon the pleadings, and the only question here presented is whether

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the action of the court in rendering judgment for appellees was correct.

The facts stated in the complaint and found by the jury are in substance: That in June, 1894, and at all other dates hereinafter mentioned, appellee, Griffin, was a duly elected, qualified, and acting constable of Eel township, Cass county, Indiana, and that appellee, John Dunn, was his bondsman; that by the terms of his bond said Griffin was obligated to turn over to the proper person all moneys which might be received by him by virtue of his office; that on the 18th day of June, 1894, August Held and Edward P. Rank executed to Ferdinand Krebs a chattel mortgage to secure the payment of an indebtedness of \$350.00, owing by them to him, which became due September 18, 1894; that such mortgage was duly recorded in the proper mortgage record of Cass county, Indiana, on the day of its execution: a verbatim copy of the mortgage is set out in the special verdict. The following is the language of one of its recitals: "Know all men by these presents that August Held and Edward P. Rank, of Cass county, in the State of Indiana, have bargained and sold, and do hereby bargain and sell unto Ferdinand Krebs, of Cass county, Indiana." Then follows a description of the articles of property mortgaged and a statement of the indebtedness intended to be secured. The mortgage further provided that Held and Rank should retain possession of said property until the debt secured became due, and if not paid promptly at maturity Krebs should have the right to take possession of the same, and that if the property should be levied upon by execution from any court the mortgagee should have the right to take possession of the same for his own use. The jury further found that the property mortgaged was the property of Held and Rank. That on the 25th day

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of July, 1894, Held and Rank sold the mortgaged property to Herman Kammerer, subject to the lien of said mortgage, which said mortgage debt he assumed to pay; that on the 8th day of September, 1894, Francis Spry recovered a judgment before a justice of the peace of Eel township, Cass county, against Herman Kammerer for \$25.00 and costs, on which an execution was issued by said justice and placed in the hands of the defendant, Griffin; that he duly levied the same upon the chattels described in the mortgage; that at the time of said levy said mortgage debt was due and unpaid; that said Griffin subsequently advertised and sold said property, but that before the sale he was notified by the appellant, Krebs, not to deliver the same to the purchaser until the amount due on the mortgage was paid, and the terms of the mortgage complied with; and that if he failed to do so said Krebs would hold him and his bondsman responsible on his bond for the value of said property, and all damages he might sustain by reason of his failing to comply with the requirements of the statutes of the State of Indiana; that said constable delivered said property so sold to the purchaser without requiring him to comply with the terms of the mortgage or to discharge the lien thereof; that Held and Rank and Kammerer since the maturity of appellant's debt have become and are still insolvent.

To entitle the appellant to a judgment below the burden rested upon him to establish a valid debt, that it was due, that the mortgage he held was valid, that the defendant, Griffin, failed in the performance of his official duty, from which failure the appellant suffered loss.

It is evident, from the brief of appellant, that the court below, in rendering judgment for appellees, held that the mortgage was invalid as to them because

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there was no finding by the jury that the mortgagors were, at the time of its execution, residents of Cass county, in which county it was recorded. Section 6638, Burns' R. S. 1894 (4913, Horner's R. S. 1896), reads as follows:

"No assignment of goods, by way of mortgage, shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee, and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof."

The Supreme Court of this State has many times had occasion to apply the provisions of this section, and has uniformly held that a chattel mortgage to be valid, as to persons not parties thereto, must be recorded in the county in which the mortgagors reside, and within ten days of its execution. A long list of citations is not necessary. *Sidener v. Bible*, 43 Ind. 230; *Lockwood v. Slavin*, 26 Ind. 124, are in point.

The finding of the jury that the mortgagors were residents of the county in which the mortgage was recorded was essential to make the mortgage valid against appellees. If they make no finding upon this question, it is equivalent to a finding that they were not residents of said county. Have they found that the mortgagors resided in Cass county?

If the fact of residence is found, it appears only in the recital of the mortgage, which the jury set out in their finding, and heretofore given. The statement in the mortgage of the residence of the mortgagors, while evidence of the fact, is not the inferential fact to be found. The jury found evidence of a fact, but not the fact itself.

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The office of a special verdict is to find the facts essential to support the judgment,—if not found, the judgment will fall.

“A failure to find a fact in favor of a party upon whom the burden as to such fact rests, is equivalent to finding such fact against him.” *Noblesville Gas, etc., Co. v. Loehr*, 124 Ind. 79, *vide* authority there cited.

The law requires that facts and not evidence should be found. *Tousey v. Lockwood*, 30 Ind. 153; *Kealing v. Vansickle*, 74 Ind. 529; *Locke v. Merchants National Bank*, 66 Ind. 353.

In *Hessong v. Pressley*, 86 Ind. 555, a trial before the court, and a special finding made, the court found that the sheriff made a certain return to an execution and copied such return. The Supreme Court held that there was not a finding of the facts stated in the return; that, at most, they were only evidentiary facts, without any finding by the court as to their truth, or the facts inferred therefrom. *Vide* also authorities there cited.

The jury in the case before us found that the mortgagors executed a mortgage at a certain date, which mortgage said that they were residents of Cass county, Indiana. This is not a finding of the fact which might have been inferred therefrom.

Appellant's counsel contend, that the jury having found that the mortgage was executed and recorded on the same day, and recited that the mortgagors were of Cass county, is a sufficient finding that the place of residence of Held and Rank was Cass county and in support of their position cite *Brown v. Corbin*, 121 Ind. 455; *Gordon v. Stockdale*, 89 Ind. 240.

In *Brown v. Corbin*, *supra*, the court trying the cause held that, the mortgage showing upon its face that the mortgagors resided in the county in which it had been recorded, the mortgage would be, *prima facie*, a valid

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lien, and the burden of proof would rest on the person asserting its invalidity to show that it was not recorded in the county where the mortgagors resided; that is, that the court trying that cause was justified in drawing the inferential fact that the mortgagors were residents of the county where the mortgage was recorded, as the jury in this cause might have been justified, in the absence of other evidence, in finding the inferential fact of residence from the recital on the face of this mortgage.

In *Gordon v. Stockdale*, *supra*, it is held that when one plants wheat under a written contract which requires him to harvest, thresh, and deliver one-half of it to the landlord, and in express terms provides that each shall own one-half, that such facts compel the conclusion as one of law, that the tenant was the owner of half the wheat.

And in *Dutch v. Boyd*, 81 Ind. 146, to foreclose a mortgage and recover personal judgment, in which the principal question was whether the mortgage contained a sufficient description of the premises intended to be described, and the court held that a deed or mortgage which purports to have been executed and acknowledged between parties resident in the State, and containing nothing to indicate a contrary intention, will be presumed to be of land in the State. The court below held that the description was sufficient, and rendered judgment and decree for foreclosure, and the Supreme Court affirmed the decision.

There is nothing in either of these cases at variance with the conceded proposition, that a special verdict must find inferential, and not evidentiary, facts, nor do they modify or criticise the application and illustration of the rule in *Hessong v. Pressley*, *supra*.

There is no error.

Judgment affirmed.

Parr v. Cutsinger.

PARR v. CUTSINGER.

[No. 2,071. Filed January 13, 1897.]

APPEAL.—Weight of Evidence.—A judgment of the trial court will not be reversed on the weight of the evidence if there is any evidence to sustain it.

From the Johnson Circuit Court. *Affirmed.*

Robert M. Miller and Henry C. Barnett, for appellant.

Thomas W. Woollen, for appellee.

ROBINSON, J.—This action was brought by the appellee against the appellant on a judgment, and also for money paid by the appellee as surety for the appellant. A demurrer to the complaint was overruled and exceptions taken. The appellant answered in four paragraphs: First, general denial; second, set-off; third, payment; fourth, a special plea of accord and satisfaction. A demurrer to the fourth paragraph of answer was overruled. A reply of general denial was filed to the third and fourth paragraphs of answer, and of general denial and payment to the second. Trial by the court, and a finding in favor of the appellee for \$671.16. A motion for a new trial was overruled, and judgment was rendered upon the finding.

The only error assigned by the appellant is the overruling of the motion for a new trial.

The reasons assigned for a new trial were that the finding of the trial court "was contrary to the evidence," that it was "not sustained by sufficient evidence," and also "contrary to the law."

We have carefully read the evidence, and while it is conflicting, yet there is evidence which supports the

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finding on every material point. The evidence fails to support all the material allegations of the fourth paragraph of the answer. Even if the agent had full power to accept the property in full satisfaction of the debts, a point not necessary to decide, yet there is nothing in the record showing that he entered into such an agreement. We find nothing in the record which takes this case out of the well settled rule, that if there is any evidence to sustain the finding, this court will not reverse the case on the weight of the evidence. The reasons for this rule have been so often stated that it is not necessary to repeat them here. *Lawrence v. Van Buskirk*, 140 Ind. 481; *Hoskinson v. Cavender*, 143 Ind. 1, and cases cited.

Judgment affirmed.

LUHR v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

[No. 2,090. Filed January 13, 1897.]

SPECIAL VERDICT.—*Should Find Facts Only.*—A special verdict should find the facts essential to a recovery, and not mere conclusions of law.

SAME.—*Negligence.—Fire Escaping from Railroad Right of Way.*—A special verdict which finds that a railroad company negligently permitted combustibles to accumulate upon its right of way, and so negligently operated its engine that large coals of fire were negligently dropped therefrom setting fire to such combustibles, which fire was negligently permitted to escape upon plaintiff's land, etc., does not state sufficient facts upon which the court can properly base a conclusion that the railroad company failed to perform its duty in the premises through the want of due care.

From the Porter Circuit Court. *Affirmed.*

A. L. Jones, for appellant.

J. W. Youche and J. B. Collins, for appellee.

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BLACK, J.—In the appellant's action against the appellee for damage caused by fire communicated to the appellant's land from the appellee's adjoining right of way, the court overruled the appellant's motion for judgment upon a special verdict, and this action of the court is presented for our consideration.

The contention of counsel relates to the question, whether the verdict sufficiently showed negligence on the part of the appellee, to authorize judgment thereon for the appellant.

It was stated in the verdict that on the 5th day of April, 1893, the appellant was the owner in fee simple of certain lands described, through which the right of way and railroad of the appellee ran on a line about ten rods north of the south line of said land; that on said day there was standing on said land a grove of young growing timber of about six acres, which was north of and adjoining the right of way of the appellee; "that said six acres was of the value of \$60.00 per acre, and of the total value of \$360.00; that on said 5th day of April, 1893, a large amount of dry grass, weeds, leaves, rubbish, and other combustibles were on the right of way of the defendant along and through plaintiff's said land, which dry grass, leaves, weeds, rubbish, and other combustibles the defendant carelessly and negligently suffered and permitted to gather, accumulate, be and remain on its said right of way through and adjoining the said land of the plaintiff; that on said 5th day of April, 1893, the defendant, by its agents and servants, was running and operating a train of freight cars along and on its said railroad, through and by the said land of the said plaintiff, which said train of cars was a way freight train, and was known as train No 52, and was drawn and propelled by engine No. 39; that the defendant, by its agents and servants, so negligently operated and

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managed said engine as that large coals of fire were carelessly and negligently dropped therefrom, and sparks of fire were carelessly and negligently emitted therefrom, which said coals and sparks of fire so being dropped by, and emitted from said engine, the defendant carelessly and negligently suffered and permitted to fall among, and set fire to, the said dry grass, weeds, leaves, rubbish, and other combustibles, so negligently suffered and permitted to gather, accumulate, be and remain upon the right of way of the defendant, and along its track, near and adjoining plaintiff's said land, as aforesaid; and that the defendant carelessly and negligently suffered and permitted the fire so started to spread and escape from defendant's said right of way, and onto plaintiff's said land, and to spread over and burn through said grove of young growing timber, thereby killing and destroying the trees and timber standing and growing on three acres of plaintiff's said land. * *

* That said fire was started, and spread, and said damage was done and caused, solely by and through the fault and negligence of the defendant as hereinbefore found."

The statements of the verdict were in great part repetitions of the complaint.

In a special verdict facts only should be found, and not mere conclusions of law. All the facts essential to a recovery must be stated. The verdict should contain the ultimate facts. If, in an action for negligence, such facts be stated in a special verdict that it can only be inferred from them that there was negligence, or that there was not negligence, the verdict need not state the inference of negligence or of no negligence. In such case the court will determine, as a matter of law, from the facts so found, that there was or was not negligence. If, the facts being stated, rea-

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sonable men might candidly disagree as to the proper inference to be drawn therefrom concerning the existence or non-existence of negligence, the jury should draw the proper inference, and state it in the verdict. But whether the facts are such that the conclusion should be left to the court, or such that the jury should state the proper inference, the facts upon which the conclusion of the court is to be based, or from which the jury makes the inference, should be stated in the verdict. The facts cannot be supplied by implication or intendment. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39; *Cleveland, etc., R. W. Co. v. Hadley*, 12 Ind. App. 516.

The statement in a special verdict, that an act or omission was negligent, will not vitiate the verdict, but it may add nothing that will increase its value to the party having the burden of the issue.

In the verdict before us it does not appear from facts set forth that the presence of the combustible materials upon the right of way at the time specified was due to the appellee's negligence. No facts are stated upon which either the court or the jury could properly base a conclusion that the appellee failed to perform its duty in the premises through want of due care and diligence.

The judgment is affirmed.

SISK v. CITIZENS' INSURANCE COMPANY OF EVANSVILLE.

[No. 1,721. Filed January 14, 1897.]

PLEADING.—*Answer.*—*Insurance.*—In an action on a fire insurance policy containing the provision that in case of additional insurance the policy shall be void, unless consent in writing endorsed on the policy is procured from the company, an answer setting up that plaintiff procured additional insurance is sufficient without the

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further allegations that consent of the company was given in any other manner than in writing, and that such condition in the policy was not waived. *pp. 567, 568.*

INSURANCE.—Waiver.—Presumption.—The law will not presume that an insurance company has waived a provision intended for its protection. *p. 568.*

PLEADING.—Answer.—Insurance.—An allegation, in answer to a complaint on an insurance policy, that the "plaintiff procured to be issued to her a policy of insurance," is equivalent to an allegation of delivery to, and acceptance of such policy by plaintiff. *pp. 568, 569.*

INSURANCE.—Construction of Policy.—Interest of Assured.—Where an insurance policy provides that it shall be void if the interest of the assured be any other than the entire, unconditional, and sole ownership of the property, unless expressed in the policy, such policy is void where the insured owns only an undivided one-half interest, and no statement of such fact is contained in the policy. *pp. 569-571.*

SAME.—Failure of Insured to Protect Property from Damage After Fire.—An insured cannot recover damages to his property, resulting from his failure to properly care for the same after it had been wet from the water used in extinguishing a fire in the building where the property was situate, where the policy provides that the best endeavor of the insured shall be used in saving and protecting the property at and after the fire, and in case of failure to do so the company shall not be liable for damages resulting from such failure. *pp. 571, 572.*

From the Knox Circuit Court. *Affirmed.*

W. A. Cullop, C. B. Kessinger and F. M. Brant-hoover, for appellant.

Thomas Hanna, for appellee.

COMSTOCK, C. J.—This action was commenced in the Knox Circuit Court on the insurance policy issued by appellee to appellant in the sum of \$1,000.00. To the complaint, a demurrer was filed and overruled. The defendant then answered in six paragraphs. The first was a general denial.

The plaintiff demurred severally to the second, third, fourth, fifth, and sixth paragraphs, which demurrer was sustained as to the sixth, and overruled as to the others. The plaintiff replied to the second,

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third, fourth, and fifth paragraphs. There was a trial by jury, and verdict and judgment for the defendant. The errors assigned are the overruling of the demurrers of appellant to the second, third, fourth, and fifth paragraphs of defendant's answer.

The policy is set out in the complaint and contains the following provisions:

"If the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building stands on ground not owned in fee simple by the assured, it must be so expressed in the written part of the policy, otherwise the policy shall be void.

"This policy shall be void * * * if the interest of the assured in the property, whatever that interest may be, is not truly stated in the policy.

"This policy shall become void in each of the following instances, unless consent in writing of the company is endorsed hereon, viz.: If the assured, or any person having an insurable interest in the property, shall now have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, whether the same be valid or not."

The second paragraph of the answer alleges that after the issuance of the policy in suit, plaintiff procured on the same property insurance, from the German Insurance Company, of Freeport, Illinois, in the sum of \$700.00, without the consent in writing of the defendant company, endorsed upon the policy sued upon, which said policy, issued by the German Insurance Company, was, and still is valid. Counsel for appellant contend that this paragraph is fatally defective, because it does not aver that consent of the company for other insurance was not given in any other manner than in writing, and does not negative the

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waiver of the condition that such consent must be given in writing, endorsed on the policy; that to avoid the policy, for this reason, the defendant assumed the burden, and should have pleaded the matter of avoidance.

To this proposition we cannot assent. Such a provision in a policy, as has often been stated by the courts, is for the benefit of the insurer to protect the company from the hazard of overinsurance. The law will not presume that the defendant waived a provision intended for its protection. Such condition may be waived as held in *Moffit v. Phenix Ins. Co.*, 11 Ind. App. 233; *New v. German Ins. Co.*, 5 Ind. App. 82. *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990, cited in appellant's brief, and in numerous other decisions of our Supreme Court.

In the cases in which the question of waiver is passed upon, as a rule, averments of facts claimed to constitute waiver are set out, either by way of reply to answer, pleading the breach of condition, or in the complaint.

The matter set up in the paragraph of answer was such as in terms avoided the contract of insurance. Plaintiff in effect rendered it voidable and the waiver of the forfeiture was a proper subject of reply.

The third paragraph of answer alleges prior insurance without notifying defendant company, and without procuring its consent endorsed on the policy. The objections to the second and third paragraphs are substantially alike, and the same authorities and reasoning apply to both. It is further urged that the allegation, "that the plaintiff procured to be issued to her a policy of insurance, is not equivalent to an allegation of delivery to, and acceptance of such policy by the plaintiff." Conceding the learning of counsel, we think they are in error in this interpretation. A

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standard dictionary defines the word procured "to acquire for one's self," "to cause;" and the word issue "to deliver for use." An allegation, that one has caused to be delivered to himself any article, imports its acceptance.

The fourth paragraph of answer alleges that the plaintiff does not own the entire interest in the property insured, but that one James Sisk owned the one undivided half thereof at the time said policy was issued.

The objection urged to this paragraph is that it does not aver facts showing no insurable interest in the property.

In support of this proposition counsel in their able brief cite *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668; *Knop v. National Fire Ins. Co.*, 101 Mich. 359, 59 N. W. 653, 2 Am. St. 686; *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Carpenter v. German American Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Von Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; the policies in which cases contain provisions as to titles of the insured similar to the policy issued by the defendant company.

Imperial Fire Ins. Co. v. Dunham, *supra*, was a case in which the holder of the policy was the purchaser, under articles, of the land upon which stood the property insured. The court held that the policy was not void, upon the ground that he was the equitable owner in fee, and, in respect to the insurance, the entire, unconditional, and sole owner; that, when articles are entered into for the sale of land, the purchaser is considered the owner.

In *Knop v. National Fire Ins. Co.*, *supra*, the insured held the property under contract of purchase; and in *Carpenter v. German American Ins. Co.*, *supra*, the court held that the provisions of the policy were waived by

the insurer. In these cases the insured held the property under articles of purchase, and were, in the respective opinions given by the court, owners in fee.

In *Cross v. National Fire Ins. Co.*, *supra*, and *Carpenter v. The German American Ins. Co.*, *supra*, and *Van Schoick v. Niagara Fire Ins. Co.*, *supra*, it is held that the policies were not avoided, although the insured did not own the entire and sole interest in the property, because the agents soliciting the insurance and issuing the policies had knowledge of the facts as to the titles of the insured; that their knowledge was the knowledge of their principals, and that the circumstances attending the issuing of the policies amounted to a waiver of the condition in question.

In *Philadelphia Tool Co. v. British-American Assurance Co.*, 132 Pa. St. 236, 19 Atl. 77, the insured was a lessee, for a term of years, of a building in which he was engaged in the manufacturing business, and the court used the following language: "We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover, in good faith, the interest which the insured had in the buildings. Fraud is never to be presumed."

If the court in that case was justified in holding that the policy was issued with knowledge of the interest the insured held in the real estate in which its business was being carried on, the assumption that the insured in the case before us owned only an undivided interest in the household goods described in the policy, and that the defendant had knowledge of that fact, we think would not be warranted.

Counsel cite a number of authorities, to the effect, that whenever loss may be sustained, an insurable interest exists. This proposition is not questioned; but it is also true that, unless a statement of interest is

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required, either in the application or policy, the insured need make none; and, unless otherwise provided, it is sufficient that the applicant has an insurable interest. Unless more particularly inquired about, or there be a fraudulent concealment or misrepresentation, it does not invalidate the policy, when the applicant states that he is the owner of the property, or that it is his, if in some substantial sense this is true, although it turns out that he has not a perfect and absolute title. But it is different when more exact information with regard to the title is required; as when the true title is called for, or where it is provided that, if the interest of the insured be any other than that the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or be incumbered, it must be so represented to the company, and so expressed in the policy, otherwise the policy shall be void. 7 Am. and Eng. Ency. of Law, 1020-1022. See *Philips, etc. v. Knox, etc., Ins. Co.*, 20 Ohio 174; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen 213; *Pinkham v. Morang*, 40 Me. 587; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599; *Addison v. K. & L. Ins. Co.*, 7 B. Mon. (Ky.) 470; *Murphy v. People's etc., Ins. Co.*, 7 Allen 239, and many other cases there cited.

Judged by these decisions, the fourth paragraph of the answer is sufficient.

The fifth paragraph alleges that the property became very wet from the water thrown thereon to extinguish the fire in the building where the same was situate; that the plaintiff used no endeavor to dry or clean the same, but suffered it to remain in that condition; that if it had been properly cared for the damage thereto would not have exceeded \$100.00. It admits a damage occasioned by the fire of \$100.00, and is pleaded only as a defense to the amount claimed in excess of that sum.

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The policy provides that the best endeavor of the insured shall be used in saving and protecting the property from damage at and after the fire, and, in case of failure to do so, the company shall not be liable for damage caused by such failure. There can be no abandonment to the company of the property insured. This paragraph charges a failure of the insured to perform her part of the contract in case of injury of the property by fire and states wherein she was negligent.

We find no error in the rulings of the court below. Judgment affirmed.

ROBINSON, J., took no part in this decision.

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[No. 2,038. Filed January 14, 1897.]

LIENS.—Foreclosure of.—Priority.—Estoppel.—A decree in a proceeding to foreclose a drainage lien is not conclusive against a defendant who is the holder of a prior lien for taxes, and was made a party to the foreclosure proceedings, and defaulted, where the complaint in such foreclosure proceedings does not state facts, which, if admitted, would subject the lien of the defendant to the drainage lien. *pp. 575-578.*

SPECIAL FINDING.—Failure to Find Fact Proved.—Remedy.—New Trial.—Where there is an omission from the special findings of the court of an essential fact proved at the trial, the proper remedy is a motion for a new trial and not by exceptions to the conclusions of law. *p. 576.*

APPEAL AND ERROR.—Failure to Name Defaulting Defendant in Assignment of Errors.—An appeal will not be dismissed for the failure of the appellant to name in his assignment of errors a defendant that had been defaulted, where the appellee's joinder in error was filed at the time of the assignment of errors, and the motion to dismiss not filed until nearly six months thereafter, and until more than three months after the filing of appellant's brief, and the presence of such defaulting defendant was not necessary for a decision of the case, and his absence in no way prejudicial to appellee. *p. 578.*

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From the Huntington Circuit Court. *Affirmed.*

James C. Branyan, John S. Branyan, and James F. France, for appellant.

M. L. Spencer, W. A. Branyan and R. A. Kaufman, for appellee.

BLACK, J.—A question is presented in this case concerning the amount of a tax lien, which was enforced upon certain land in Huntington county in favor of the appellee, under his counterclaim, in an action of ejectment brought by the appellant, in which the appellant obtained judgment for the recovery of possession.

The facts, as set forth in a special finding, upon which the court stated a conclusion that the appellee was entitled to hold a lien in the sum of \$1,037.14 and to the foreclosure thereof, were, so far as necessary to elucidate the question discussed before us, in substance, as follows:

Samuel Mahon died intestate before the year 1870, seized in fee simple of the land in question, leaving surviving him, as his heirs at law, a son, Elam A. Mahon, and two daughters, Cynthia E. Dunham and the appellant, Virginia M. Allen. The son died intestate about the year 1875, leaving as his heirs at law his two sisters above named, and owning one-third of said land. On the 29th day of June, 1891, said Cynthia E. Dunham conveyed by deed her interest in the land to the appellant, and on the 27th of October, 1891, Thomas Roche conveyed to the appellant, under an order of the court below, "upon proper proceedings for that purpose, the said Elam A. Mahon's interest in said land."

On the 6th of March, 1882, at the sales of delinquent lands for the non-payment of taxes for the years 1876

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to 1881, inclusive, and former years, made by the county auditor, Solomon Rice, the appellee, purchased the land here in question, paying therefor \$316.35, and received the auditor's certificate of such purchase; and on the 7th day of March, 1884, he presented said certificate to the auditor and received a deed of conveyance as provided by law, said land not having been redeemed, and caused said deed to be duly recorded, the cost of the deed and that of recording being certain sums stated. Since said purchase the appellee paid taxes on said land, on the 10th of March, 1892, in the sum of \$96.65. In the tax duplicate and in said certificate and said deed issued to the appellee, the description of the land was defective, the defective description being set out in the finding; but the land so assessed is the land in question in this suit.

On the 16th of October, 1888, one Edward Ely, as drainage commissioner, brought a suit in the court below against the appellant, the appellee, and others, alleging in his complaint, among other things, that under proceedings in the Superior Court of Allen county, Indiana, upon the petition of James Bransrator and others for the improvement of the Little Wabash, an assessment of benefits to said land to the amount of \$480.00 by said proposed improvement had been finally adjudged and decreed by said court, and declaring such assessment a lien against said land, which was subject to lien of such assessment; but such complaint did not refer to appellee's purchase at the tax sale, which was prior to the proceedings in said Superior Court, or seek any relief against the same, or allege that the appellee's claim was invalid, void or unpaid; nor did the judgment in said cause so declare. The complaint in that cause asked judgment for fifty-five per cent. of the assessment, and a fore-

closure of the lien thereof against said land. The appellee was duly served with process in that cause, and made default; and upon the hearing the court found that the alleged assessment was a lien upon the land described in the complaint and entered a decree foreclosing such lien in the sum of \$286.00, and directed a sale of the land. Afterward a copy of said decree was issued by the clerk of the court below to the sheriff, who advertised said land for sale, and upon the day named in the advertisement he sold the land to one C. S. Bash for \$100.00, and issued to him a certificate, which he afterward assigned to one H. C. Paul, to whom the sheriff, on the return of the certificate, on the 31st of March, 1891, issued his deed conveying the land to him. On the 31st of October, 1891, said Paul conveyed the land to the appellant.

At the commencement of this suit, and since the year 1890, the land was held by certain persons named, as tenants of the appellee, and he had expended a sum mentioned for improvements, and had received a certain amount of rents and profits. The rental value for the period of appellee's possession was stated. Since 1890 the appellant has been a resident of New York, and has had no personal knowledge or charge of said land, and her sister, Cynthia, whose residence was not disclosed by the evidence, was, at the date of the finding, thirty-three years of age.

The sum for which the court concluded the appellee entitled to the enforcement of a lien included the amount which he paid upon his purchase at the tax sale, and the amount of the taxes paid by him afterward, with interest.

It is contended on behalf of the appellant that the claim of the appellee should not be upheld, except for the taxes paid by him after the adjudication in the

proceeding to enforce the drainage lien, and proper interest thereon; that the purchaser under the decree foreclosing the drainage lien acquired title paramount to the lien of the appellee for the purchase price at the invalid tax sale; that the decree in the drainage proceeding, to which the appellee was made a party and in which he suffered a default, estops him from asserting his prior lien.

It appears from the special finding that the appellee held the senior lien. If its enforcement can be defeated because of the former adjudication in the proceeding to foreclose the drainage lien, it should affirmatively appear in the special finding that in the former proceeding his lien was *res judicata*.

Unless the facts that the appellee was made a party defendant in that proceeding and was duly served with process and made default can be regarded as sufficient to bar his right to an enforcement of his lien, he is not concluded by the decree in that proceeding.

It is not claimed that any fact, beneficial to the appellant, was proved which is not stated in the finding; and if this were true, the remedy for such omission would be sought by motion for a new trial, and could not be had through an exception to the conclusion of law.

It is a general rule that a default is only conclusive as to such matters as are properly averred in the complaint. *Barton v. Anderson*, 104 Ind. 578.

A judgment is conclusive upon all questions which were or might have been litigated within the issues before the court. *McFadden v. Ross*, 108 Ind. 512; *Griffin v. Wallace*, 66 Ind. 410; *Axtel v. Chase*, 83 Ind. 546, 553.

"The general rule is, that the issuable facts or matters, upon which the plaintiff's case proceeded, deter-

mine what was in issue, unless it appears from an examination of all the pleadings in a given case, that other matters were brought forward and thus became necessarily involved and determined in the suit." *McFadden, v. Ross, supra.*

The bare fact that a senior mortgagee is a party in a suit to foreclose a junior mortgage does not estop him from afterward foreclosing his mortgage. *Ulrich v. Drischell*, 88 Ind. 354, 362; *English v. Aldrich*, 132 Ind. 500.

It does not appear that the complaint in the proceeding to enforce the drainage lien stated any facts which, if admitted, would subject the appellee's lien to the drainage lien, or to the relief sought in that proceeding; nor is there any statement of fact in the finding before us showing that the appellee was challenged in any form by that complaint to litigate the question as to the superiority of his lien, or showing that such question was determined by the judgment rendered in that proceeding.

Krutsinger v. Brown, 72 Ind. 466, was an action of foreclosure brought by Brown. Krutsinger was made a defendant, it being alleged in the complaint that he held a mortgage junior and subsequent to that of the plaintiff, which Krutsinger had foreclosed upon the real estate described in the plaintiff's mortgage, and that at a sale under his decree of foreclosure the real estate had been purchased by Krutsinger, who still held a sheriff's certificate of sale thereof. It was held that Brown, the holder of the senior mortgage, could not be required to aver and prove that his rights had not been defeated in the action brought by the junior incumbrancer upon the inferior lien; and in discussing the answer of Krutsinger to Brown's complaint it was said by the court that the answer of

res adjudicata, to be good, must affirmatively show that the question was litigated, or could have been litigated, under the issues, and was therefore impliedly covered by the judgment.

We do not find the conclusion of law, upon the facts stated, open to the objection urged against it by the appellant.

As to the effect of the portions of the finding showing part ownership of the appellant in the land in question, at the time the taxes, or a portion thereof accrued, for non-payment of which the land was sold to the appellee, we make no decision. There is some indefiniteness in the finding upon this matter. The subject is not discussed by the appellant, and we have not found it necessary to examine the question.

The appellee moved to dismiss the appeal, for the reason that a person who was made a party defendant in the court below, and was defaulted, was not named as an appellee in the assignment of errors. The appellee's joinder in error was filed at the time of the filing of the assignment of errors. This constituted an appearance. The motion to dismiss was not filed until nearly six months thereafter, and until more than three months after the filing of appellant's brief. It was filed with appellee's brief upon the merits. The person named in the motion has no material interest in the matter in controversy here, his presence is not necessary for its decision, and his absence does not harm the appellee. The motion to dismiss is overruled. *Wilson v. Hefflin*, 81 Ind. 35.

We find no error in the action of the court which has been brought in question before us.

Judgment affirmed.

Pittsburgh, etc., Railway Company v. Cope.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. COPE.

[No. 1,915. Filed January 15, 1897.]

APPEAL AND ERROR.—*Longhand Manuscript of the Evidence, How Incorporated in Bill of Exceptions.*—The record must affirmatively show that the longhand manuscript of the shorthand report of the evidence was filed in the clerk's office before the filing of the bill of exceptions, and not at the same time and as a part thereof.

SAME.—*Instructions.—Evidence not in Record.*—It will be presumed on appeal, the evidence not being in the record, that the instructions asked and refused were refused because not applicable to the case made by the evidence; and that the instructions cannot be regarded as erroneous if they would be correct under any state of facts admissible under the issues.

From the Henry Circuit Court. *Affirmed.*

L. P. Newby and John L. Rupe, for appellant.

John M. Morris, James Brown and Samuel H. Brown, for appellee.

HENLEY, J.—Appellee began this action against the appellant to recover damages on account of the destruction of his saw mill by fire, which fire, it is alleged in the complaint, was caused by the negligent act of appellant.

There was a trial of the issues joined, resulting in a verdict and judgment for the plaintiff, over defendant's motion for a new trial.

The errors complained of in the motion for a new trial are the admission of certain evidence, the giving and the refusal of the court to give certain instructions, and that the verdict was contrary to the law and the evidence.

Counsel for appellee urge with much earnestness that the evidence is not in the record, and as most of the questions presented here for decision could not be decided without the evidence, we will first determine that matter.

It is imperative that the longhand manuscript of the evidence should have been filed in the clerk's office before it was incorporated in the bill of exceptions. Section 1476, Burns' R. S. 1894; *DeHart v. Board, etc.*, 143 Ind. 363; *Marvin v. Sager*, 145 Ind. 261; *Rogers v. Eich*, 146 Ind. 235; *Hamrick v. Loring* (Ind. Sup.) 45 N. E. 107; *Manley v. Felty*, 146 Ind. 194; *Chicago, etc., R. W. Co. v. Wagner*, (Ind. App.) 45 N. E. 76.

The courts of the state have gone to the extent of holding that the record must *affirmatively* show that the longhand manuscript of the shorthand report of the evidence was filed in the clerk's office before the filing of the bill of exceptions, and not at the *same time* or as a *part of* the bill of exceptions. *Hamrick v. Loring, supra*.

In the last mentioned case, Judge Hackney, delivering the opinion of the court, says:

"The transcript contains a bill of exceptions, signed by the trial judge, and filed in the clerk's office on a day named. This bill contains what purports to be the original longhand manuscript of the shorthand report of the evidence, but the record in no manner disclosed the filing of this manuscript in the clerk's office before it was incorporated in such bill, nor otherwise than as a part of the bill. This failure violates the statutory requirement, where the evidence is not copied by the clerk, and where the original is sought to be made a part of the record. * * * It is true that within the bill of exceptions there is a certificate of the clerk of the trial court to the effect that on a day named, being the same day upon which the bill of exceptions was filed, the longhand manuscript of the evidence was filed in his office, and is the same which is embodied in the bill of exceptions. This certificate, if we observe it as a proper method of disclos-

ing the fact of a filing, *does not advise us whether such filing was as a part of the bill, was separate from it, or was before or after the filing of the bill.* All that the clerk certifies may be true, and the manuscript may have been filed after the bill of exceptions was filed. From the facts disclosed, the clerk may have judged that the filing of the bill, including the manuscript, was a filing of the manuscript. We must hold, therefore, that the appellees' contention in this respect shall prevail."

And in *Rogers v. Eich*, *supra*, the Supreme Court, by Jordan, J., says: "The evidence introduced upon the trial was taken down by an official reporter, and it is sought to have the original longhand manuscript certified to this court. *It does not affirmatively appear that the longhand manuscript was first filed in the office of the clerk before it was incorporated into the bill of exceptions*, and under the holding of this court in *Carlson v. State*, 145 Ind. 650, and in *Manley v. Felty*, 146 Ind. 194, the evidence cannot be considered as properly in the record."

And in the case of *Manley v. Felty*, *supra*, the Supreme Court of this State, opinion of Hackney, J., says: "Other questions are discussed upon the motion for a new trial, all depending upon the evidence, but the appellee's objection to a consideration of the evidence must prevail. It is certified by the clerk, 'that on the 31st of May, 1895, the official shorthand reporter, who took down the evidence in said cause, filed in my office his longhand transcript and manuscript thereof, and the plaintiff at the same time filed his bill of exceptions, which longhand manuscript was made a part thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions.'

"In the recent case of *Carlson v. State*, 145 Ind. 650, it was said: 'It is settled by the decisions of this court

that the filing of the longhand evidence must be antecedent to its being incorporated into the bill of exceptions by the signature of the judge to such bill.' ”

The record in this cause, on page nineteen, shows that on the 6th day of August, 1895, appellant filed its bill of exceptions, numbered one, and on page fifty-three, the following entry occurs:

“And at the same time comes the said defendant and files herein her bill of exceptions No. 2, which is the record of all the evidence given upon the trial of said cause and the objections thereto made and certified by A. D. Ogborn, the official reporter of the Henry Circuit Court, on the request of the said defendant from the shorthand reports of said reporter, and the same being the longhand transcript of such evidence made from such shorthand notes taken by said reporter during the trial of said cause, under oath, and the same duly signed and certified by the judge of said court, as well as by said reporter, is now filed by the defendant as her bill of exceptions No. 2, of the evidence in this cause, to be attached to the transcript therein as a part of the record in this cause on appeal as provided by statute in such cases, which is as follows:”

Then follows the original longhand manuscript of the evidence and following this is the certificate of the clerk of Henry Circuit Court, which, omitting the caption, is as follows:

“I, Charles L. Hernly, clerk of the Henry Circuit Court, do hereby certify that the foregoing transcript is a full, true and complete copy of all the proceedings and order book entries made, and all of the papers now on file in my office, and of the judgment of the court; and that the evidence embodied in the transcript is the identical, original longhand manuscript of the evidence, made by the official shorthand re-

porter, who was duly sworn according to law to report the evidence in said cause as embodied in defendant's bill of exceptions No. 2. In witness thereof I have hereunto set my hand and affixed the seal of the Henry Circuit Court, at Newcastle, Ind., this 21st day of August, A. D. 1895. Charles L. Hernly, Clerk, Henry Circuit Court."

It nowhere affirmatively appears that the longhand manuscript of the evidence was ever filed in the clerk's office before it was incorporated in the bill of exceptions. The certificate of the clerk does not recite that it was ever filed in his office except at the same time, and as a part and parcel of the bill of exceptions.

In fact, the record in the cause affirmatively shows that the longhand manuscript was filed by defendant (appellant) at the same time and as a part of its bill of exceptions. The reasons for the statutory requirements in this regard are fully set out and explained in *DeHart v. Board, etc., supra*, and it is not necessary for us to further examine the matter.

As was said in *Manley v. Felty, supra*, "the most favorable construction of this record for the appellant is, that the longhand manuscript and the bill of exceptions were filed at the same time, and that the former had not been filed before it was incorporated in the bill."

Under the decisions of this court, and of the Supreme Court of this State, the evidence in this cause is not in the record.

Having held that the evidence is not in the record this court will presume that the instructions asked and refused, were refused because they were not applicable to the case made by the evidence. *Jenkins v. Wilson*, 140 Ind. 544; *Holland v. State*, 131 Ind. 568; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88. And that the instructions given cannot be regarded

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as erroneous if they can be considered correct upon any state of facts admissible under the issues. *Hilker, Admx.*, v. *Kelley*, 130 Ind. 356, 15 L. R. A. 622; *Joseph v. Mather*, 110 Ind. 114; *Rapp v. Kester*, 125 Ind. 79; *Abrams v. Smith*, 8 Blackf. 95.

We have examined the instructions carefully and we are of the opinion that none of the instructions would be erroneous under any state of facts that were admissible under the issues.

The evidence not being in the record the admission or rejection of any part thereof complained of by appellant is not before us, nor is the question whether the verdict is contrary to the law or the evidence presented.

There is no error as shown by the record, the judgment is therefore affirmed.

STALCUP BY NEXT FRIEND, v. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

[No. 2,102. Filed January 15, 1897.]

CARRIERS.—*Who is a Passenger.*—One who is riding on a railroad train, free of charge, by the "invitation and permission" of the conductor is not a passenger so as to entitle him to recover for injuries received.

RAILROADS.—*Master and Servant.*—One who is on a railroad train, performing labor without recompense, with the "acquiescence, knowledge, consent, and permission of the conductor and all other persons running and conducting the train" is not a servant toward whom the company owes any legal obligation; it not being shown that the conductor and others in charge of the train were authorized to employ such person to perform the labor in which he was engaged.

From the Greene Circuit Court. *Affirmed.*

William L. Slinkard, for appellant.

E. C. Field, W. S. Kinnan, C. E. Davis and W. V. Moffett, for appellee.

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WILEY J.—The appellant, being a minor, brought this action by his next friend, to recover damages, alleged to have been received while riding on appellee's railroad. The complaint is in two paragraphs, to each of which the appellee addressed a demurrer, which was sustained by the trial court, and an exception reserved. The appellant refusing to plead over, the court rendered judgment for appellee for its costs, and the appellant appealed. The error assigned is the sustaining of the demurrer to each paragraph of the complaint.

The first paragraph of the complaint avers that the appellee was the owner of and operating a line of railroad from Bedford, Indiana, to Swiss City, Indiana, passing through the town of Bloomfield, and engaged in carrying passengers and freight, on what was known and designated a "mixed train;" that a part of the line of said road was a bridge over White river, about forty feet high, and three hundred feet long; that on the fourth day of June, 1893, and for a long time prior thereto, the "plaintiff, by invitation and permission of the conductor and all others in control of said train, and with full knowledge and consent of all persons conducting the management of said train, was riding on said train, and for more than two years before said time, between said points, had been riding on said train for the purpose of being carried from said town of Bloomfield to said town of Swiss City, by said defendant; that said bridge, on said day, was composed of three spans; that the middle span was, on said day, rotten, decayed, weak, old, dangerous, and unsafe; that defendant on said day, and for more than six months prior thereto, had full knowledge of said condition of said span, and recklessly, negligently, and wantonly refused, neglected and failed to make the same safe and secure; * * * that on said day,

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while riding on said train, said span on said bridge, without any fault or negligence on the part of the plaintiff, but wholly through the fault, negligence, recklessness, and wantonness of the defendant, gave way, broke, and tumbled into said White river, and the train and car on which plaintiff was riding, was thrown and fell into said river, a distance of forty feet, whereby he was seriously injured," etc.

It is strongly urged by counsel for appellant, in their very able brief, that each paragraph of the complaint is sufficient and that the court erred in sustaining the demurrer thereto.

From the parts of the complaint quoted in this opinion, it is apparent that the first paragraph proceeds upon the theory, that the plaintiff was upon the defendant's train, at the time of the accident, by the invitation, permission and consent of the conductor, who was in charge of it; that the plaintiff was without fault or negligence, and that the defendant is liable to respond in damages by reason of such facts. As it is averred that plaintiff was on defendant's train by the invitation of the conductor, to be carried from Bloomfield to Swiss City, in the absence of any contrary allegation, it is to be presumed that he was being carried free of charge. Do these facts constitute the relation of passenger and carrier? The answer to this inquiry will lead us to the solution of the question under consideration. The Supreme Court of Pennsylvania has given a very lucid definition of the term "passenger," as follows:

"A passenger, in the legal sense of the word, 'is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as to the payment of fare or that which is accepted as an equivalent therefor.'" *Bricker v. Railroad Co.*, 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. 585.

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"A passenger is a person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care, either upon the means of conveyance, or at the point of departure of that means of conveyance." 2 Am. and Eng. Ency. of Law, p. 742; *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256.

It is clear, therefore, from these authorities that the facts stated in the first paragraph of the complaint do not show that the appellant was a passenger, in the legal meaning of that term, on defendant's train. As averred in this paragraph, the appellant was upon the train "by the invitation and permission of the conductor."

The general rule is that conductors and other employes in charge of a train are not clothed with authority to invite persons to take passage with them as their guests, and especially is this true of conductors and employes of freight trains. In New York, it has been held that "the servants of the railway in charge of such trains have no implied authority to invite strangers to become passengers thereon, and in the absence of proof of express authority vested in the conductor, the acceptance of his invitation to ride thereon does not make a stranger a passenger. *Eaton v. Delaware, etc., R. R. Co.*, 57 N. Y. 382; *Waterbury v. New York, etc., R. R. Co.*, 17 Fed. 671; *Dunn v. Grand Trunk R. W. Co.*, 58 Me. 187, 4 Am. Rep. 267.

The complaint in the case now under consideration, avers, in the first paragraph, that appellant was on defendant's train by the "invitation and permission" of the conductor. It is not averred that the conductor was empowered with the authority either to invite or permit the appellant to become a passenger, or to ride upon the train, under the facts charged. In the absence of such allegation, no presumption can be in-

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dulged that the conductor or other employes connected with the train, were authorized to extend to the appellant such invitation.

It is the settled rule in this State that before there can be any liability on account of negligence, in cases of this character, it must appear that the party complained of was under some legal duty or obligation to the person injured. *City of Indianapolis v. Emmelman*, 108 Ind. 530, 9 L. R. A. 813; *Penso v. McCormick*, 125 Ind. 116, 21 Am. St. 211; *Thiele v. McManus*, 3 Ind. App. 132; *Carskaddon v. Mills*, 5 Ind. App. 22.

Under the averments of the first paragraph of appellant's complaint no such duty or obligation exists.

Counsel for appellant, with other cases, cites the case of *Evansville Street R. W. Co. v. Meadows*, 13 Ind. App. 155, in support of his contention that appellant was a passenger, and entitled to all the rights of a passenger, by reason of the invitation of the conductor.

In that case a girl ten years of age was invited by the driver of a street car, drawn by mules, to ride, and was injured while so riding, by the gross carelessness of the driver. And again in that case, it was conceded by appellant that the child was rightfully upon the car, and hence it was held that the appellant owed her some protection.

The second paragraph of the complaint is couched in almost the same language as the first, except it seeks to aver that the plaintiff, at the time of the accident was in the employment of the defendant.

That part of the second paragraph of the complaint is as follows:

"This plaintiff, on said day and for more than two years prior thereto, was and had been working for said defendant, loading and unloading freight, assisting passengers on and off said train; setting and

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throwing brakes, and doing the general work of a brakeman; that said plaintiff on said day and for more than two years before said day, did and had performed said labor with the acquiescence, knowledge, consent and permission of the conductor and all other persons conducting and running said train, and for more than two years before, and on said day plaintiff had ridden and did ride on said train, between said towns of Bloomfield and Swiss City, performing the work as aforesaid. * * * That on said day said plaintiff was on said train in performance of said work and labor, and going to the said town of Swiss City to perform similar work and labor for said defendant, when said span of said bridge gave way," etc.

The averments of the second paragraph of the complaint, are wholly insufficient to show that he was an employe of the defendant. He avers that he was then performing labor, and for more than two years prior thereto had been performing labor with the "acquiescence, knowledge, consent and permission of the conductor and all other persons running and conducting said train." It is not charged that the conductor, or other persons operating the train, were authorized to employ the appellant to perform the labor in which he was engaged. No emergency or necessity is shown for the employment of appellant.

Counsel for appellant concede that he could not maintain an action against appellee to recover for the services he had performed, and in this concession we think he tacitly admits the insufficiency of his second paragraph of complaint.

The case as made by the second paragraph of the complaint, is indential in principle to the case of *Cooper v. Lake Erie, etc., R. R. Co.*, 136 Ind. 366. In the case just cited, appellant got on one of defendant's freight trains at the town of Poneto, under an

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arrangement with the conductor and brakeman, who had charge of the train, that he should assist the brakeman so far as he could, in consideration of being permitted to ride to Muncie; while switching at Montpelier, he was injured by being thrown from the top of a freight car by the carelessness and negligence of the employes of appellee. The Supreme Court, in that case by Howard, C. J., says:

“While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of appellant. *Neither was appellant a passenger; for, even if he had a right to ride upon a freight train, it does not appear that he paid or offered to pay his fare.* No custom, rule or regulation of the appellee company is shown, by which appellant might pay his way by working on the train, assisting the brakeman or other employe. There is no theory suggested by counsel, and the court can see none, according to which the complaint might be held good. At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to so receive him. Any dangers to which he thus became exposed were wholly at his own risk.” (The italics are our own.)

It is useless under the case just cited to pursue our inquiry further. As neither paragraph of the complaint stated a cause of action, the trial court properly sustained the demurrer.

Judgment affirmed.

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DILTZ v. SPAHR.

[No. 1,811. Filed January 26, 1897.]

PLEADING.—*Amendment After Close of Evidence and Argument.—*
Statute Construed.—Under the provisions of section 394, Burns' R. S. 1894, the court may in its discretion permit amendments to be made to pleadings during the progress of a trial and after the close of the evidence and the conclusion of the argument, unless it affirmatively appears from the record that such amendment was prejudicial to the adverse party and that the trial court abused its discretion.

BROKERS.—*Commission.—Special Finding.*—A special finding, in an action for a commission of four per cent. on \$8,000.00 for negotiating a loan for that amount, which shows that defendant orally promised plaintiff a commission of four per cent. on \$8,000.00, if he would procure some person to make him a loan of that sum on certain real estate, and that plaintiff negotiated with a copartnership for the purpose of making such loan and had a member of such firm to inspect the real estate, introduced him to defendant and obtained his personal consent to make the loan, but after consulting with his copartners the loan was declined by the copartnership, but the party who inspected the premises, in his individual capacity, made defendant a loan of \$2,000.00 on such real estate without the knowledge of plaintiff, will not support a conclusion of law that defendant was indebted to plaintiff and entitled to recover the sum of \$80.00, being a commission of four per cent. of \$2,000.

From the Marion Superior Court. *Reversed.*

Upton J. Hammond and *E. St. G. Rogers*, for appellant.

George W. Spahr, for appellee.

WILEY, J.—The appellee sued the appellant to recover a commission for services in procuring a loan. The original complaint was in one paragraph, and was in the statutory form upon an account stated. With this paragraph the appellee filed, as an exhibit, a bill of particulars as follows:

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"INDIANAPOLIS, IND., Dec. 24, 1894.

AMOS K. DILTZ to WM. H. SPAHR, Dr.

To commission securing \$8,000.00 loan, \$320.00."

The appellant answered by general denial and the cause was submitted to the court for trial, without the intervention of a jury. After the introduction of all the evidence and the conclusion of the arguments of counsel, the appellee, over the objection and exception of appellant, was permitted to file an additional paragraph of complaint, which paragraph was in the words and figures following, viz.: "The plaintiff for a further and second paragraph of complaint herein says, the defendant is indebted to him in the sum of three hundred dollars (\$300.00) for work and labor done, which work and labor was done at the special instance and request of the said defendant, and that the same is due and wholly unpaid, wherefore plaintiff prays judgment for \$500.00," etc.

This second paragraph of complaint is identical with the first, except that it is not accompanied with a bill of particulars, as an exhibit. Upon the filing of the second paragraph of complaint, the record recites the following: "And on plaintiff's motion, the said defendant is ruled to answer the said second paragraph of complaint herein, and the defendant declining so to do, the court now takes this case under advisement."

The court, on its own motion, made a special finding of facts, and stated its conclusions of law thereon, and such proceedings were had, as that judgment was rendered against appellant for \$80.00.

The appellant reserved exceptions to the conclusions of law, and has, in this court, assigned errors as follows:

"1. The court erred in allowing the plaintiff to amend his complaint by filing the second and further paragraph thereof, on and after the trial of the cause.

"2. The court erred in its conclusions of law on the findings."

We will consider these assignments of error in their order.

Counsel for appellant earnestly insist that the court erred in permitting the appellee to file an additional paragraph of complaint, after the close of the evidence and the conclusion of the argument. With this contention, we cannot agree. Our statute and the adjudicated cases thereunder are very broad and liberal on the question of amendments to pleadings, and this court will not reverse a judgment unless it affirmatively appears from the record that such amendment was prejudicial to the adverse party, and it must also appear that the trial court has abused its discretion.

It seems clear to us that the second paragraph of the complaint was not filed under the provisions of section 399, Burns' R. S. 1894 (396, Horner's R. S. 1896), wherein it is provided that: "The court may, at any time, in its discretion, and upon such terms as may be deemed proper for the furtherance of justice, direct * * * *any material allegation to be inserted, struck out, or modified—to conform the pleadings to the facts proved*, when the amendment does not substantially change the claim or defense." The additional paragraph filed does not seek to amend the original complaint, neither does it add to or take from it. Nor was it made to "*conform the pleadings to the facts proved*." It follows, therefore, that the additional paragraph was filed under section 394, Burns' R. S. 1894 (391, Horner's R. S. 1896), which provides generally for amendments to pleadings.

While we are unable to see any necessity for filing the second paragraph of complaint, or how the ap-

pellee was to be benefited thereby, yet there was no reversible error in permitting it to be done.

In any event the amendment was not prejudicial to the appellant, as it did not state a different cause of action than that contained in the first paragraph; it required no additional proof, and there is nothing in the record to show that he was misled thereby.

It has been repeatedly held that where the trial court has permitted amendments to be made to pleadings during the progress of the trial, and after the conclusion of the evidence, the adverse party must affirmatively show that he was prejudiced before he will be entitled to a reversal of the judgment on that ground. *Adams v. Main*, 3 Ind. App. 232; *Leib v. Butterick*, 68 Ind. 199; *Judd v. Small*, 107 Ind. 398; *Levy v. Chittenden*, 120 Ind. 37; *Sanford, etc., Co. v. Mullen*, 1 Ind. App. 204.

That there may be a clear understanding of the facts, and an intelligent discussion and determination of the second assignment of error, it is necessary for us to copy into this opinion the special finding of the court and its conclusion of law thereon. They are as follows:

"1. That the defendant orally promised the plaintiff to pay him a commission of four (4) per centum of eight thousand dollars (\$8,000.00) if he, plaintiff, would procure some person to lend him, defendant, that sum on the security of a first mortgage on his farm.

"2. Thereupon the plaintiff, with the knowledge of the defendant, began to negotiate with a copartnership, composed of ten members and doing business under the firm name and style of the Anderson Banking Company, to the end of procuring it to lend the defendant that sum on said security.

"3. That the plaintiff so negotiated with and

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through one Baker, a member of said co-partnership and its president, and took said Baker to inspect said farm, and then made said Baker and said defendant acquainted with each other, and talked over with them of the borrowing and lending of said sum on said security.

"4. That said Baker then expressed his personal willingness, as a member of said co-partnership, to lend the said sum on said security, but said, in that connection, that he would have to go to Anderson, Indiana, and submit the matter to, and obtain the consent of his copartners before the same could be done.

"5. That upon such submission of said matters by said Baker to his said copartners, they refused their assent to lend said sum on said security.

"6. That afterwards, and while the plaintiff was resting in the belief that said matter was still under consideration and undetermined by said Baker and his co-partners, the said Baker and the defendant came together without the knowledge or participation of the plaintiff, and with the apparent intent of wholly ignoring the plaintiff, the said Baker, made in his individual capacity, and with his individual money, and the defendant took a loan of two thousand dollars (\$2,000.00), on the security of a second mortgage upon the said farm.* * *

"7. That said farm was before and at the time of said defendant's promise to the plaintiff incumbered by a mortgage debt of six thousand dollars (\$6,000.00), accruing, due on September 15, 1896, and bearing interest at the rate of six per centum, payable semi-annually, upon which the defendant was in default as to an installment of interest, in the sum of one hundred and eighty dollars (\$180.00), which fell due September 15, 1894, and that it was understood between

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the said defendant and said plaintiff that said mortgage was to be paid and discharged out of the proceeds of said contemplated loan of eight thousand dollars (\$8,000.00), but under the loan as finally consummated by said Baker, his two thousand dollar mortgage was taken subject to the above named incumbrance of six thousand dollars (\$6,000.00)."

Upon the foregoing facts the court stated its conclusion of law as follows:

"That the defendant is indebted to the plaintiff and the plaintiff is entitled to recover of and from the defendant, on the second paragraph of his complaint filed herein, by leave of the court on the 3d day of May, 1895, the sum of eighty dollars (\$80.00), being a commission of four (4) per centum of two thousand dollars."

We are unable to understand, upon what theory, the conclusions of law, as stated by the trial court, can be maintained. From the facts found by the court, there are no facts appearing in the record, upon which any judgment in favor of the appellee on his second paragraph of complaint could be predicated.

The pivotal and controlling facts as found by the court are these:

1. That appellant promised to pay appellee four per centum on \$8,000.00, if he would procure for him (appellant) a loan of that amount, to be secured by mortgage on real estate.
2. That appellee did negotiate with one Baker, representing a copartnership, to the end that said loan might be consummated.
3. That the appellee failed to procure and consummate said loan.
5. That in negotiating with said Baker for said

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loan, the appellee brought the appellant and Baker together and made them acquainted.

6. That after the said copartnership refused to make said loan of \$8,000.00, the appellant and Baker "*came together without the knowledge or participation of the plaintiff,*" and that Baker made appellant a loan of \$2,000.00 "*in his individual capacity and with his individual money.*"

There are no facts found by the court, showing that the appellee had performed his part of the contract, in procuring for appellant a loan of \$8,000.00, but on the contrary it is expressly found that he had failed to do so.

The complaint was drawn and the trial proceeded upon the theory that appellee was entitled to recover from the appellant four per centum of \$8,000.00, or \$320.00. Counsel for appellee, in his brief, still insists that this was the correct measure of damages. We are not deciding the question, for it is not presented by the record, whether or not in an action upon the *quantum meruit* upon a proper allegation and proof, the appellee could recover from the appellant a commission on \$2,000.00, which the appellant borrowed of Baker. We hold, however, that the appellee, if he is entitled to recover at all, must recover upon the theory of his complaint.

It is the settled rule in this State that a party must recover *secundum allegata et probata* or not at all. *Louisville, etc., R. W. Co. v. Renicker*, 8 Ind. App. 404; *Baesker v. Pickett*, 81 Ind. 554; *Hewitt v. Powers*, 84 Ind. 295; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Ivens v. Cincinnati, etc., R. W. Co.*, 103 Ind. 27; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Louisville, etc., R. W. Co. v. Godman*, 104 Ind. 490; *Spencer v. McGonagle*, 107 Ind. 410.

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There is no evidence, disclosed by the special finding of facts, to make a case for appellee under the theory of the complaint and the issues joined, and he was not entitled to recover any judgment thereunder.

The court erred in stating its conclusions of law, and the judgment is reversed, with directions to the court below, to restate its conclusions of law, and render judgment for appellant.

BLACK, J., not present.

THE MARSHALL FARMERS' HOME FIRE INSURANCE
COMPANY v. LIGGETT.

[No. 1,999. Filed January 26, 1897.]

INSURANCE.—*Forfeiture.*—*Waiver of by Accepting Delinquent Assessments After Loss.*—*Mutual Insurance Company.*—Where a director of a mutual insurance company, who was acting as collector, called upon assured the next morning after a fire and collected two delinquent assessments on a policy of insurance covering such loss, having knowledge of such loss, and the company retained the money so collected, a forfeiture of such policy on account of such delinquency is thereby waived.

From the Marshall Circuit Court. *Affirmed.*

Charles Kellison, for appellant.

Samuel Parker, for appellee.

COMSTOCK, C. J.—This was an action commenced by the appellee on a certificate of membership and policy of insurance held by him on his dwelling house and contents in a farmers' mutual insurance company, organized under the laws of this State, in Marshall county, and doing business in said county under the name of "The Marshall Farmers' Home Fire Insurance Company," to recover damages for their destruction by fire.

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At the time of the loss appellee was delinquent, having failed to pay two assessments made against him for the purpose of paying the losses of other members of the company. The company refused to pay the loss on the ground of such delinquency, and it was claimed by appellee that the company had waived the right to insist upon the condition of the policy, for the reason that the company had collected two assessments from the insured after his loss, with full knowledge, and retained the same.

The appellant contended that under the provisions of the policy issued by it, and under the facts connected with the collection of the assessments, there was no waiver of the condition of the policy. The cause was tried by a jury and a verdict returned, and a judgment rendered for \$822.00 in favor of appellee.

The errors assigned challenge the correctness of the rulings of the court upon the demurrers to complaint and reply, in overruling appellant's motion for a new trial, in overruling appellant's motion for judgment, and in overruling appellant's motion in arrest of judgment.

Exceptions were taken to the rulings of the court in making up issues, to the giving and the failure to give instructions, and to the ruling of the court upon the admission and exclusion of testimony.

The controlling question of the case is whether the appellant waived the forfeiture of the policy in suit by accepting the payment of two delinquent assessments from the plaintiff after the loss had occurred, to recover which this suit was brought.

The facts set out in the pleadings and proven by the evidence, essential to the decision of the case, are, that on the 9th day of December, 1892, the appellant, being a farmers' mutual insurance company, and doing business under the laws of the State, issued its cer-

tain certificate of membership and policy of insurance to the appellee, on his dwelling house, valued at \$500, and its contents, valued at \$300.00; insuring them from loss by fire for the term of five years from said December, 1892; that appellee paid appellant \$2.50, and entered into an agreement to pay his just and equal proportion of any loss sustained by any member of said company, according to the rules and laws of the appellant; that in March, 1895, the dwelling house and contents were entirely destroyed by fire, through no fault of appellee; that, prior to and at the time of said loss, appellee was delinquent upon two assessments due other members of the company for loss sustained by them; that, although he was notified of such assessments, he had failed and refused to pay them; that on the morning after the fire, which occurred on the 15th day of March, 1895, a director of the company, who was acting as collector for the company, with knowledge of the appellee's loss, collected from him the two delinquent assessments, and subsequently paid them to the treasurer of the company, with other delinquent assessments which he had collected from other members of the company; that, immediately after the fire, appellee notified the company in writing, of the same, and on the 25th of March, 1895, the company informed him in writing, that his claim for loss would not be paid, for the reason that he had forfeited his policy because of said delinquency.

The company retained the assessments paid by appellee.

Upon the facts stated, if the appellant should be held to have waived its right to insist upon the forfeiture of the policy, the appeal is not well taken.

The certificate of membership, agreement, constitution and by-laws of the company are all set out in the pleadings.

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Section 4 of the constitution reads as follows: "The officers of the company shall be a president, secretary, treasurer, and one director in each township in which the company insures."

Section 5. "The officers of the company are to constitute a board for the transaction of all the official business of the company, a majority of whom shall constitute a quorum for the transaction of any business of the board."

Section 27. "Any person insuring in this company is to be considered a member thereof."

Section 33. "Any member wishing to withdraw from the company, or have his insurance canceled, must give notice thereof to the secretary who shall note thereon the precise time of receiving it, also on back of entries."

Section 34. "No member can withdraw from this company without first paying all assessments levied or liable to be assessed against him up to the time of his notice to the secretary."

Section 11 of the by-laws. "Any person failing to pay his distributive share of any assessment shall forfeit his insurance during such delinquency."

Section 37 of the constitution. "The treasurer, upon receiving such assessment from the secretary, shall immediately proceed to collect the same by demand, or by suit, if necessary, and pay over to the member sustaining such loss the amount thereof, within one month after receiving such assessment, and take his receipt therefor."

Appellant contends that under the provisions of the policy issued, and the facts connected with the collection of the assessments, there was no waiver of the conditions of the policy; that appellee's loss did not occur during any period of the term of the policy for which he paid.

Appellee contends that the facts show the intention of the company to waive the forfeiture; that the acceptance of appellee's money with knowledge of his loss is waiver. In support of the proposition of waiver appellee cites the *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L. R. A. 317, to the effect that forfeitures are not favored in law, and that courts will put such a construction on the conduct of parties as will produce a waiver thereof, if possible; that the right to declare a forfeiture for the failure to perform a condition therein may be waived, and the waiver manifested as well by conduct as by words, citing also, *Germania Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. 792.

Appellant contends that this case is not in point for the reason, among others, that it was a stock company, while the appellant is a mutual company.

In Richards on Insurance, p. 80, the author says: "The tendency among the courts seems to be to deny the distinction between mutual and stock companies altogether, in respect to the power of the officers and agents to waive conditions and estop the company from insisting on forfeitures; for, as a matter of fact, the applicant for insurance rarely knows anything about the charter or by-laws, and could hardly be expected to be acquainted with them at the time of making his application. Universally it is held that the acceptance of an assessment or premium by the home office is a waiver by the company of all former grounds of forfeiture known by it."

In *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, it is said "on breach of the condition and forfeiture of insurance, the defendant had the election to avoid the policy, or waive its right to claim its forfeiture. Conditions in a policy of insurance, limiting or avoiding liability, are strictly construed against the insurer, and liberally in favor of the assured. Though

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a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations, insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture." To the same effect is *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

In *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 16 Atl. 263, the court, after citing a number of cases, quotes from the *Insurance Co. v. Wolff*, 95 U. S. 326, as follows: "It is true, that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and, if subsequently, the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived;" and adds: "These cases, and many others that might be cited, fully establish the doctrine that knowledge affecting the rights of the insured, which comes to an agent of an insurance company while he is performing the duties of his agency in procuring applications for insurance and delivering policies and collecting premiums, becomes the knowledge of the company, and if the latter afterwards collects premiums of such parties it waives all objection with regard to the matters of which it has such knowledge."

In *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183,

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7 Sup. Ct. 500, the court says: "If insurers accept payment of a premium after they know that there has been a breach of the condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach." *Vide*, also, the authorities therein cited.

When the director called upon the appellee to collect the delinquent assessments, he looked at the ruins of the house and said: "I suppose you know what is lacking." Nothing was said about a forfeiture, but the assessments were then paid, and the appellee instructed that he should notify the company in writing.

For months before the fire the company knew of the delinquency. Notices had been given in November previous, and in placing these assessments, with others, in the hands of one of the directors for collection, nothing was said about forfeiture. The instructions were to leave them with a justice of the peace for collection if the agent himself failed to collect them.

In *Farmers' Ins. Co. v. Bowen*, 40 Mich. 147, the opinion was given by Cooley, C. J., and is as follows: "The defendant in error in 1865 effected with the plaintiffs in error an insurance upon his house and household furniture, subject to the payment of such assessments as should be made by the company from year to year to meet losses suffered and expenses incurred. In February, 1875, the house and furniture were destroyed by fire. At that time there were two unpaid assessments of which defendant in error had been notified. One of the by-laws of the company provided that where the assessments were thus overdue and unpaid, the assured should forfeit all claims against the company for any loss or damage sustained during the delinquency. Immediately after the fire Bowen paid up the assessments to the local agent of the insurance company, who received the amount with

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knowledge of the loss, but forwarded the money to the company without mentioning the fire of which the officers at that time had received no notice from any other quarter. March 16th, 1875, the board of directors of the insurance company adopted a resolution 'that the secretary and chairman of the board of directors be instructed to draw an order on the treasurer in favor of William Bowen for the amount of Bowen's loss, on the recommendation of the auditing board, when said loss is adjusted.' * * * Yet on the 2d of April following the board passed another resolution that they did not consider the company liable on account of the non-payment of the assessments. An adjustment of the loss was therefore refused. The circuit judge was quite right in holding the company bound by its reception of the assessments and recognition of the loss."

The similarity of this case and the one at bar justifies this lengthy quotation. The forfeiture clause in each policy is practically the same; the same reason is given in both for refusing to pay loss; the assessments in each case were for earned premiums.

When the appellee paid the assessments he was no longer delinquent, he owed the company nothing.

In assessment companies there is no advance payment of premiums, the forfeiture claim is for the benefit of the company. It may waive it. If the company accepts and retains the amount of the assessments after default, the reciprocal rights of the parties stand unimpaired.

This condition is entirely within the control of the company. It may declare a forfeiture of the policy and then cut off the delinquent members from all benefits, or it may collect delinquent assessments waiving forfeiture.

There is no evidence that appellee intended to with-

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draw from the company; he made no attempt to do so. There is no evidence that the company intended to forfeit his policy. It is quite clear that appellee and the director of appellant, at the time payment was made of the delinquent assessment, believed that appellee was entitled to payment for loss. Directions as to the manner of giving notice to the company of the loss would, in any other view, have been meaningless. The evening before the fire the director who collected the assessments was informed that appellee wished to pay them, and the morning after the fire he said to the appellee, in the presence of the ruins, "I guess you know what is lacking," and appellee answered, "I do. Have you got any blanks?" The blank receipt was produced and filled up; the money was paid, and receipt given, signed by the treasurer of the company, whose name the director had authority to sign. These facts are pertinent on the subject of intention of the parties, and were proper to go to the jury determining the question of waiver.

From a careful examination of the record we conclude that the merits of the case have been fairly tried, and that it contains no error for which the judgment of the court below should be reversed.

Judgment affirmed.

BLACK, J., absent.

KIRSHBAUM v. HANOVER FIRE INSURANCE
COMPANY ET AL.

[No. 2,067. Filed January 26, 1897.]

PARTIES.—*When Party in Interest May be Admitted as Defendant.*
—*Action on Insurance Policy.*—*Statute Construed.*—A stockholder in a corporation is, under section 274, Burns' R. S. 1894 (273, R. S. 1881), entitled to be admitted as a party defendant in an action by the mortgagee of the corporation on an insurance policy on the

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corporate property, where the policy was by mistake of the insurance company's agent and without the knowledge and consent of such stockholder made payable to the mortgagee instead of such stockholder who paid for the insurance.

PRACTICE—Argumentative Denial.—*Action on Insurance Policy.*—

A paragraph of answer, in an action on an insurance policy, which denies that the policy in suit was issued to plaintiff, amounts to an argumentative denial and is properly overruled as defendant may introduce under the general denial any proof that will meet what plaintiff is bound to prove in order to recover.

APPEAL AND ERROR.—*Special Finding.*—A finding of fact by the court which is supported by evidence will not be disturbed on appeal.

SAME.—*Special Finding.*—When a finding of fact made by the court is within the issues presented by the pleadings, and is supported by the evidence it cannot be contrary to law.

PRACTICE.—*Impeachment.*—A question asked for the purpose of impeachment in reference to a conversation with a certain person at a given place which fixes the time of the conversation as "about one year ago" is proper where the exact time cannot be fixed.

From the Jay Circuit Court. *Affirmed.*

Cornelius Corwin, John M. Smith and Headington & LaFollette, for appellant.

R. H. Hartford, for appellees.

ROBINSON, J.—This action was brought by the appellant against the Hanover Fire Insurance Company to recover for a loss by fire to certain buildings and machinery of the Portland Milling Company. Jacob R. Jones and the appellee, Hanlin, were made parties defendant. The cause was put at issue and was tried by the court. At the request of the appellant, the plaintiff below, the court made a special finding of the facts, and thereon stated its conclusions of law. To the conclusion of law, the appellant excepted. Over appellant's motion for a new trial, and exception, judgment was rendered in favor of appellee, Hanlin, for \$821.34.

The facts found by the court were substantially as follows: On the 21st day of October, 1886, the Port-

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land Milling Company, a corporation, executed to the appellant a mortgage upon a certain lot in Portland, Jay county, on which was situated the buildings of the milling company, to secure an indebtedness of five thousand dollars then owing by the company to the appellant. This mortgage was foreclosed by the appellant on the 27th day of February, 1894, and on the 24th day of March, 1894, the property described in the mortgage was sold by the sheriff; and for the purpose of collecting his mortgage debt the appellant purchased the property for the sum of \$5,960.68, the same being the amount of his judgment, interest and costs; and on the 28th day of March, 1894, the appellant was the holder of the sheriff's certificate of purchase therefor. In the foreclosure suit, Jacob R. Jones was appointed receiver for the milling company, and was receiver on the 28th day of March, 1894. Leave was granted to make the receiver a party defendant to this action to answer as to any interest the milling company might have in the policy of insurance sued on. On the 28th day of March, 1894, the building and machinery on which the appellant's mortgage was executed were destroyed by fire. The purchase of the property under the foreclosure proceedings was in full satisfaction of the appellant's judgment, and the execution and decree were returned by the sheriff fully satisfied. On the 27th day of February, 1894, the People's Bank recovered a judgment against the Portland Milling Company, as principal, and the appellee, Hanlin, Ira Denney, and Patterson M. Hearn for \$2,725.52, which judgment was paid in full on that day by appellee, Hanlin. On the same day, the Citizens' Bank of Portland, Indiana, recovered a judgment against the milling company, as principal, and the appellee, Hanlin, Ira Denney, and Abraham Bergman, as sureties, for the sum of \$487.31; and on the

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same day the Citizens' Bank recovered another judgment against the milling company, as principal, and appellee, Hanlin, and Ira Denney, as sureties for the sum of \$931.42; and that the appellee, Hanlin, had paid \$900.00 on the judgment in favor of said Citizens' Bank. At the time the property was destroyed by fire, and for a long time prior thereto, the appellee, Hanlin, owned about \$6,000.00 of the capital stock of the milling company. On or about the 27th day of March, 1894, the appellee, Hanlin, applied to the agent, at Portland, of the Hanover Fire Insurance Company, for insurance on the milling company's property, for \$3,000.00, for the benefit of himself and the said Denney, Hearn and Bergman, from loss as surety for the milling company; that the agent agreed to write such insurance for a premium of \$142.50, which appellee, Hanlin, was to pay to said agent. The appellee, Hanlin, not knowing how the insurance should be written to protect him and his co-sureties, but the agent, having had long experience as such agent, agreed to write the insurance as appellee, Hanlin, had requested; that said Hanlin left the \$142.50, to pay the premium on said insurance when the policies were ready, with receiver Jones, who was to call on the agent and pay the premium and procure the policies for appellee, Hanlin. The agent wrote two policies, for fifteen hundred dollars each, one for the Farmers' Fire Insurance Company, and the other for the Hanover Fire Insurance Company, the last named being the policy in suit; each were issued and dated March 27th, 1894. After the policies were written, but before they had been delivered to receiver Jones, and before the premium had been paid, to-wit: on the 28th day of March, 1894, the property so insured was destroyed by fire. The milling company was at that time, and has since

been wholly insolvent. On the 30th day of March, 1894, receiver Jones, as appellee, Hanlin's agent, tendered to the insurance agent the premium money, and demanded the policies, which were refused; and said Jones, at the instance of the insurance agent, deposited the premium money in bank and the policies were retained by the agent until the day of trial. The court further found that the agent, in writing the policies, disregarding the agreement to write them to protect appellee, Hanlin, and his co-sureties, wrongfully and fraudulently, and without the consent or knowledge of Hanlin and said sureties, inserted in each of said policies that the loss, if any should occur by fire, should be paid to the appellant, mortgagee, as his interest might appear. That neither Hanlin nor his co-sureties had any knowledge that the policies were so written until after the property burned. No part of the sum of money paid by appellee, Hanlin, on the People's Bank judgment, and the \$900.00 on the two judgments in favor of the Citizens' Bank has ever been repaid to him. The insurance evidenced by the policy in suit was procured by the appellee, Hanlin. Neither the appellant nor the receiver for the milling company paid or agreed to pay any part of said premium. At the time the policy in suit was written, the appellant held policies on the property to the amount of \$6,750.00.

The Hanover Fire Insurance Company, by agreement made in open court with the appellant and appellee, Hanlin, and receiver Jones, paid into court the sum of \$821.34, and ten dollars for costs, and was discharged from further liability on account of the policy sued on. Neither the appellee, Hanlin, nor the receiver, ever saw the policy in suit until the day of the trial

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On the facts found, the court stated, as conclusion of law:

"1st. That the plaintiff, Raphael Kirshbaum, take nothing by his complaint.

"2d. That the cross-complainant, Jacob R. Jones, receiver of the Portland Milling Company, take nothing by his cross-complaint.

"3d. That the cross-complainant, John T. Hanlin, should have and recover of and from the defendant, the Hanover Fire Insurance Company, the sum of \$821.34.

"4th. That the cross-complainant, John T. Hanlin, should have and recover of and from the defendants to his cross-complaint, to-wit: Raphael Kirshbaum and Jacob R. Jones, receiver, his costs by him in this suit paid, laid out and expended, except such costs herein as have been paid by the defendant, the Hanover Fire Insurance Company."

The first error assigned calls in question the ruling of the court in admitting John T. Hanlin as party defendant on his own application. In his application, he shows that he is a stockholder in the milling company on whose property the policy in the suit was issued; that the policy should have been made payable to him, and not to the appellant, but by mistake of the insurance company's agent, and without his knowledge or consent, the policy was made payable to the appellant, of which fact he was ignorant until after the insured property was destroyed by fire; and that he paid for the insurance for which suit is brought by the appellant. We think this shows that he has such an interest in the subject-matter as entitles him to be made a party defendant, under section 274, Burns' R. S. 1894 (273, R. S., 1881). *Pickrell v. Jerauld*, 1 Ind. App. 10.

The demurrer to the second paragraph of appel-

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lee, Hanlin's answer admits that the facts therein set out are true; and, if so, they would defeat the plaintiff's right to recover. Under the general denial, a defendant may introduce any proof that will meet what the plaintiff is bound to prove in order to recover. This paragraph of answer amounts to an argumentative denial. It denies that the policy of insurance sued on was issued to the appellant, and there was, therefore, no material error in overruling the demurrer. *Leary v. Moran*, 106 Ind. 560, *Sohn v. Jervis*, 101 Ind. 578; *Clauser v. Jones*, 100 Ind. 123.

As we view the special finding, it must be considered as based 'exclusively upon the second paragraph of the cross-complaint of Hanlin. This being true there could be no reversible error in overruling the demurrer to the first paragraph to appellee, Hanlin's cross-complaint. If there was error in such ruling it was harmless. *Chicago, etc., R. R. Co. v. Fenn*, 3 Ind. App. 250; *Taylor v. Wootan*, 1 Ind. App. 188; *Hill v. Pollard*, 132 Ind. 588.

The demurrer to the second paragraph of the cross-complaint was for want of facts; and, "2. That there is a defect of parties plaintiff in this, that Ira Denney, John R. Perry, Patterson M. Hearn, and A. Bergman should be made parties defendant."

In any view of the pleader's meaning, the presence of the parties named was not necessary to a complete determination of the issues between the appellant and the appellee, Hanlin. They had paid nothing by reason of their suretyship, but all that had been paid was paid by the appellee, Hanlin, and the amount paid by him was in excess of the whole insurance. Nor did they pay or agree to pay the premium, or any part of it. Under an agreement to which the appellant was a party, the insurance company had paid into court the amount for which it was agreed it was lia-

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ble under the policy, and was discharged from further liability on the policy; and the cross-complaint, asking no judgment against the appellant, asks that the amount paid to the clerk be paid to the appellee in full discharge of the liability of the insurance company by reason of the insurance. The case of *Gilbert v. Allen*, 57 Ind. 524, is not in point. That case was a suit on a judgment that had been recovered by a firm composed of several persons, against Allen and another person named, and one only of the judgment creditors and judgment defendants, respectively, were made parties, and no reason shown for the omission.

As the insurance company's liability on the policy had been determined by an agreement in court, there could be no necessity for a reformation of the policy. The appellant admits, in his brief, that the facts found are almost identical with the averments of the second paragraph of appellee, Hanlin's cross-complaint. The facts found are substantially the facts alleged in that paragraph of the cross-complaint, and by his exceptions to the conclusions of law the appellant admitted, for the purpose of the exception, that the facts were fully and correctly found by the court. *McCrory v. Little, Gdn.*, 136 Ind. 86; *Blair v. Blair*, 131 Ind. 194; *Warren v. Sohn*, 112 Ind. 213.

From the facts found, the conclusions of law, stated by the court, necessarily follow, that the appellant take nothing by his complaint, and that the appellee, Hanlin, was entitled to recover from the defendant insurance company the sum of \$821.34, and from the defendants to his cross-complaint, Kirshbaum and Jones, receiver, his costs, except such costs as had been paid by the insurance company.

A new trial is asked because the finding is not sustained by the evidence, and that it is contrary to law. We have carefully examined the record and it cer-

tainly contains evidence to support the finding, and according to the familiar rule, that is sufficient. We are not informed why the finding should be held contrary to law. When a finding is within the issues presented by the pleadings, and is supported by the evidence, it cannot be contrary to law. *Ashmead v. Reynolds*, 134 Ind. 139.

It is also urged that the court erred in permitting certain impeaching questions to be asked a witness for the appellant, and in admitting the impeaching evidence itself, for the reason that the time fixed was too indefinite. In fixing the time of a conversation the words "about one year ago" were used, and objection is made to this part of the question only.

In laying the foundation for the impeachment of a witness, the time and place of the conversation, and the person with whom it was held, should be specified with sufficient definiteness to enable the witness clearly to identify it. The name of the person and the particular building in which the conversation in question took place are given. In the case of *Bennett v. O'Byrne*, 23 Ind. 604, it is said: "The rule upon this subject is a practical one, and is founded upon clear principles of common sense. The exact time of a conversation it is often impossible to fix, and to require it would be simply to cut off all opportunity of impeachment in such cases. The object to be attained is to call the witness' attention to a particular conversation, so that he may not be taken by surprise. * * * Usually, dates are the least efficient of all means which can be used to refresh one's memory of events, and sometimes they afford no aid whatever." Under the circumstances of this case, we think the foundation for the impeaching evidence was sufficient.

The only remaining error complained of by appellant, in his brief, is in refusing to allow the plaintiff to

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prove by the witness, Corwin, that Hanlin had signed the proof of loss after the fire, and made no objection to the policy. We are not informed how an objection to the policy by Hanlin at that time could be material, and the same witness, Corwin, did afterwards testify that Hanlin signed the proof of loss.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

BLACK, J., absent.

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[No. 1,888. Filed Oct. 16, 1896. Rehearing denied Jan. 27, 1897.]

MORTGAGE.—Deed Absolute in Form.—A conveyance by deed absolute in form, given to indemnify the grantee against any loss as surety, is nothing more than a mortgage.

SAME.—Deed.—Evidence.—A deed absolute on its face may be shown by parol to have been intended as a mortgage.

PRINCIPAL AND SURETY.—Deed.—Mortgage.—Implied Trust.—The acceptance by a surety of a deed absolute on its face, but intended as a mortgage to indemnify him against loss by reason of his suretyship, raises an implied trust in favor of his co-sureties, and he holds the property not only as indemnity for himself, but also for his co-sureties.

APPEAL AND ERROR.—Bill of Exceptions.—Longhand Manuscript of Evidence.—The record must affirmatively show that the bill of exceptions was properly filed with the clerk after it had been signed by the court, and that the longhand manuscript of the evidence was filed with, clerk before it was incorporated in the bill of exceptions.

From the Knox Circuit Court. *Affirmed.*

George G. Reily and *James W. Emison*, for appellant.

William A. Cullop and *Clarence B. Kessinger*, for appellees.

ROSS, J.—This cause was transferred to this court by the Supreme Court, as belonging within this court's jurisdiction.

The appellee, Joseph B. Kelso, filed his complaint against his co-appellee, Kate Brouillette and the appellant James I. Kelso, as follows:

"The plaintiff complains of the defendants, and says, that heretofore, on the 19th day of November, 1882, one Jerome T. Kelso was largely involved financially, and had been for a long time prior thereto, and that on said day and for a long time prior thereto, plaintiffs were and had been securities for said Jerome T. Kelso, for the purpose of saving him from financial disaster, and that on said day above mentioned, plaintiff and defendants were securities for said Jerome T. Kelso, in the sum of six thousand four hundred dollars (\$6,400.00), evidenced as follows, to-wit: One promissory note payable to the First National Bank of Vincennes, Indiana, in the sum of one thousand four hundred and fifty dollars (\$1,450.00), one promissory note payable to the First National Bank of Vincennes, Indiana, in the sum of two thousand dollars (\$2,000.00), and also one promissory note payable to the Vincennes National Bank, of Vincennes, Indiana, in the sum of four thousand dollars (\$4,000.00). That prior to said date said parties had been and were securities for said Jerome T. Kelso, for said sums and divers other sums herein mentioned. That at said time and for a long time prior thereto the said Kate Brouillette was the mother-in-law of said Jerome T. Kelso, and that said James I. Kelso and Joseph B. Kelso were her brothers; at said time Kate Brouillette was the owner of a large amount of valuable real estate situated in Knox county, Indiana. That said James I. Kelso for a long time prior to said date, aforesaid, had become alarmed at the financial condi-

tion of Jerome T. Kelso, and had, during their said suretyship aforesaid, refused to stand longer as surety for said Jerome T. Kelso, unless he was in some way indemnified or secured against loss thereby, and the said Kate Brouillette, Julia E. Kelso, the wife of the said Jerome T. Kelso, joined by said Jerome, as Julia's husband, executed to him, said James I. Kelso, a mortgage on certain real estate in Knox county, Indiana, on the — day of January, 1882, on what was known as the river farm, said Julia E. Kelso being the owner of an undivided one-third of said river farm. That said Kate and said Julia owned as tenants in common, two-thirds of said river farm. Said mortgage was executed as an indemnity to secure said James I. Kelso against any losses he might sustain on account of his said suretyship from said Jerome T. Kelso. That said Julia E. Kelso was then the wife of Jerome T. Kelso, and so continued to be until the present time, and has ever since been. That said mortgage on said real estate was executed to indemnify and secure said James I. Kelso as a surety of said Jerome T. Kelso, and for no other purpose whatever.

“That while acting as such surety for said Jerome T. Kelso, as aforesaid, on said debts, aforesaid, at said time aforesaid, the plaintiffs and defendants entered into the following agreement, to-wit: ‘This agreement made and entered into this 25th day of November, 1882, between James I. Kelso, of Knox county, Indiana, the party of the first part, and Kate Brouillette, of Vincennes, Indiana, and Joseph B. Kelso, of Knox county, witnesses, of the second part, whereas the parties of the first and second parts are jointly and severally liable, and subject to the conditions hereinafter stated, as securities for one Jerome T. Kelso, as follows, viz.: On one promissory note to the

First National Bank of Vincennes, Indiana, for the sum of \$1,450.00; one promissory note to the First National Bank of Vincennes, Indiana, for two thousand dollars (\$2,000.00); one promissory note to the Vincennes National Bank, of Vincennes, Indiana, for four thousand dollars (\$4,000.00). Whereas the said party of the second part has a mortgage made and executed to them by the said Kate Brouillette on her farm, known as her river farm, to secure him against any loss, as to the note of \$1,450.00; and whereas, the party of the first part being a co-surety with the parties of the second part on the two notes of two thousand and four thousand dollars each at the request of the parties of the second part, and upon their promise and agreement that the party of the first part should ever be, by them, saved harmless from any payment thereof; and that he consented to become such co-surety simply to aid the parties of the second part from having to pay the said notes at once, and thereby get them further time in which to pay the said notes, or to succeed in getting the principal, Jerome T. Kelso, to pay him, and whereas the said principal, the said Jerome T. Kelso, has failed in part and in whole to pay these said notes, all of which are now past due; now, therefore, be it here understood that the party of the first part is willing and hereby agrees and covenants to pay off and satisfy in full the said note of \$1,450.00, and also agrees and covenants to release his said mortgage at a certain time hereinafter named. And be it further understood that the parties of the second part hereby covenant and agree to pay off and satisfy in full the two said notes of \$2,000.00 and \$4,000.00 each, provided that at the time they are prepared to pay off the sum the party of the first part will release his said mortgage hereinbefore mentioned.

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“Any and all property which all or either of the parties may be able to secure from the said Jerome T. Kelso is to be divided pro rata among the parties hereto. This is an agreement for a final settlement of matters herein mentioned between the parties hereto, James I. Kelso, Joseph B. Kelso and Kate Brouillette.’ Plaintiff avers that said parties thereto did pay, and become liable to pay, said notes as therein stipulated; that each and all paid the sum as therein agreed upon. Plaintiff also avers that James I. Kelso paid, of said liabilities aforesaid, the sum of \$1,450.00, and that he, plaintiff, and said Kate Brouillette paid the sum of \$6,000.00, to-wit, the sum of \$3,000.00 each, and that he has refused to repay plaintiff any part thereof, or any part of the excess over and above said liabilities before said * * * be received therefor. Plaintiff says that he kept his part of said agreement as therein stipulated, and that the defendant, Kate Brouillette, also kept her part of said agreement as therein stipulated, but that the defendant, James I. Kelso, failed and refused to keep his part of the agreement as therein stipulated, in this, to-wit, that each and every one of the parties to said agreement has paid and satisfied the notes that each and every one thereto assumed and agreed to pay, and that the same has been fully satisfied and paid so far as the parties to said agreement are concerned. That the defendant, James I. Kelso, failed to keep his part of said contract in this, to-wit, that during the pendency of their said suretyship for said Jerome T. Kelso, his wife, Julia E. Kelso, was the owner as a tenant in common with Kate Brouillette and Elizabeth Brouillette, of a hundred and twenty-nine acres of real estate situated in Knox county, Indiana, of the value of ten thousand dollars (\$10,000.00). She was the owner in fee simple of an undivided one-third thereof. And

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that during the pendency of their said suretyship aforesaid, said defendant, James I. Kelso aforesaid, procured Jerome T. Kelso, the husband of said Julia E. Kelso, for the sole and exclusive purpose of securing the above sum of money for which the plaintiff and defendants were surety for him, as an indemnity against loss on account of such suretyship, to induce his said wife, the said Julia E. Kelso, to convey to him the said real estate, which she then owned, to secure him and said plaintiff and said defendant, Kate Brouillette, as such surety for said Jerome T. Kelso, and that for said purpose, and only for the purpose of securing said parties against loss on account of their said suretyship for said Jerome T. Kelso, and his said wife, Julia E. Kelso, executed to said James I. Kelso, a deed of conveyance for her said real estate situated in Prairie Surveys numbers 14, 15, 16, 17, 18, and 19, in township three (3), of range ten (10) west, in Knox county, Indiana; that by said deed an undivided interest was conveyed in said real estate, and afterwards, to-wit, the said defendant, James I. Kelso, brought suit in the Knox Circuit Court against the aforesaid, Kate Brouillette and Elizabeth Brouillette, as owners as tenants in common with him in said real estate aforesaid, and as the interest which he acquired under said deed, by the judgment of the Knox Circuit Court, there was set off to him the following as the interest conveyed him by said deed, to-wit: Part of Upper Prairie Surveys 17, 18, 19 in Township number three (3) north, of range ten (10) west; bounded as follows: Beginning where the line between Upper Prairie Surveys 16 and 17 intersects the southeast line of right of way of the Indianapolis and Vincennes Railroad; thence south 32 degrees and 8 minutes east, 17 30-100 chains; between said surveys 16 and 17 to a stone from which an ash 15 inches in

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diameter bears north 35 3-4 degrees east, a hundred and eighty-one (181) links; thence north 75 3-4 degrees east, 6 53-100 chains to the northwest line of the right of way of the Ohio and Mississippi railway; thence curving to the right in a northeasterly direction with a radius one thousand seven hundred and thirty feet, 14 chains; thence north 75 3-4 degrees east, with a northwest line of right of way of said Ohio and Mississippi railway 2 10-100 chains to Upper Prairie Surveys number 10; thence north 82 1-4 degrees west, with said survey 24 33-100 chains to the southeast line of right of way of the Indianapolis railway; thence south 53 1-4 degrees west, to said right of way to the beginning containing 43 75-100 acres. That said James I. Kelso acquired title to said real estate for the sole purpose of indemnifying him, said Kate Brouillette, and the plaintiff herein on account of the aforesaid suretyship. That said Jerome T. Kelso procured and had said conveyance made to said James I. Kelso for said purpose and no other purpose whatever. That the sole and only object of said Jerome T. Kelso in having and securing said conveyance to be made to said James I. Kelso, was for the purpose of securing him and this plaintiff against loss on account of their said suretyship for said Jerome T. Kelso. That no other consideration was passed for the title of said real estate, and the only consideration that was passed for the same was their suretyship for said Jerome T. Kelso; that said Julia E. Kelso received no consideration therefor, and that it was a voluntary conveyance on her part for the purpose of securing her said husband, Jerome T. Kelso's indebtedness, and for no other purpose whatever. The said James I. Kelso has had the use of said real estate for eight years last past, which had been worth to him the sum of five hundred dollars

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(\$500.00) per annum. That on the — day of January, 1891, he sold and conveyed said real estate to the Vincennes Coal Company for and in the consideration of the sum of eight thousand dollars (\$8,000.00), and when he so received the sum, he appropriated the whole of the sum to his own use, and has failed and refused to account to this plaintiff for any part thereof; that he had appropriated the whole of the rents and profits which he received from said real estate during all of said time aforesaid, to his own use; that he did not divide the consideration received as aforesaid, for real estate, or the rents therefrom pro rate among the parties hereto by the terms and conditions of said contract stipulated, but he kept the whole of the same, and has failed and refused to pro rate the sum among all the parties to said contract according to the amount of the loss sustained by each on account of their said liability for and on account of their said suretyship for said Jerome T. Kelso, as per the terms and conditions of said contract aforesaid. Plaintiff avers that said Jerome T. Kelso has made no other payments on account of their loss as said suretyship, other than said real estate so conveyed to said James I. Kelso, as hereinbefore mentioned. Plaintiff avers that said Jerome T. Kelso procured and had said property aforesaid conveyed to said James I. Kelso for the benefit of all of said parties named in said contract as aforesaid stated. That it was made for the purpose of securing all of said parties according to their respective liabilities on account of being surety for him. Plaintiff further says that defendant, James I. Kelso, has failed and refused to keep his part of said contract as therein stipulated, and has broken the same as hereinbefore stated. That on account of his said failure to keep said contract, as herein stated, a cause of action on said contract has come

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to the plaintiff in this, to-wit: To have said defendant, James I. Kelso, account to him for the consideration received in payment of said real estate so conveyed by him, and the rents and profits arising therefrom, which he has collected and received and used and appropriated for his own use, and to have him prorate the same according to the terms of said agreement to him and the said Kate Brouillette according to their respective losses and liabilities for being surety for the collection for said Jerome T. Kelso. And that on account of said James I. Kelso's failure and refusal to so account and pay over pro rata to him his share thereof, he has been damaged in the sum of \$10,000.00.

"Said Kate Brouillette is made a party hereto to answer whatever interest she may have had in said contract and said sums so derived from the sale of said real estate and rents and profits arising therefrom as mentioned and stipulated in the aforesaid contract. Wherefore plaintiff prays judgment against the defendant for an accounting of the rents and profits which were received on account of the sale thereof, and for judgment in the sum of ten thousand dollars (\$10,000.00), and for all other relief in the premises."

The appellee, Kate Brouillette, did not answer the complaint, neither was she defaulted, nor was any judgment rendered for or against her in the court below.

The sufficiency of the facts alleged in the complaint to state a cause of action are vigorously assailed, the appellant insisting that the theory upon which the complaint proceeds is to establish and enforce a parol trust.

The material allegations of the complaint are that, on the 19th day of November, 1882, and for a long time prior thereto, the appellees were sureties for one

Jerome T. Kelso in the sum of sixty-four hundred dollars, as evidenced by a number of promissory notes, which were particularly described; that said Jerome T. Kelso was in failing circumstances; that Julia E. Kelso, the wife of Jerome T., was the owner of the undivided one-third of certain real estate in Knox County, Indiana, the remaining two-thirds belonging to her mother and sister, the appellee, Kate Brouillette, who is the sister of Joseph B. and James I. Kelso; that Julia E. Kelso, in order to secure and protect the appellant and the appellees as sureties, for her husband, conveyed her interest in said real estate to the appellant by a deed absolute in form; that while so acting as such surety, the appellant and the appellees entered into the agreement mentioned in the complaint, by which agreement it was agreed that "all property which all or either of the parties may be able to secure from the said Jerome T. Kelso is to be divided pro rata among the parties hereto;" that the appellant sold the property so conveyed to him as aforesaid, realizing therefrom \$8,000.00; that said Joseph B. Kelso and Kate Brouillette performed their part of said agreement and paid the obligations on which they were surety, but that the appellant, James I. Kelso, has failed and refused to comply with his part, in that he has refused to account to his co-parties for the proceeds of said sale.

Our statute, section 3391, Burns' R. S. 1894 (2969, R. S. 1881), provides that, "no trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same."

If this is an action to establish and enforce an express trust, as appellant contends, created by parol, it must fail. *Matlock's, Admr., v. Nave*, 28 Ind. 35;

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Wright, Gdn., v. *Moody*, 116 Ind. 175; *Peterson v. Boswell*, 137 Ind. 211.

If, as alleged in the complaint, the property was conveyed to the appellant by a deed absolute on its face, but in truth and in fact it was to be held as an indemnity, to protect the appellant from loss as such surety, the deed of conveyance was nothing more than a mortgage. It is well settled that a deed absolute on its face may be shown by parol to be simply intended as a mortgage. *Loeb v. McAlister*, 15 Ind. App. 643.

The demurrer admits that the property was conveyed to the appellant to indemnify him against loss in the event that he was compelled to pay any part of the obligations upon which he and the appellee were sureties. When the appellant accepted a conveyance of the property to indemnify him against loss, a trust by implication of law arose in favor of the appellees, and he held the property not only as an indemnity for himself, but also as an indemnity for his co-sureties. Where one of several sureties, who are jointly liable, is indemnified, the indemnity inures to the benefit of all, and the one holding the security by implication of law becomes a trustee for his co-sureties. *Sanders v. Weelburg, Exx.* 107 Ind. 266; *Moorman v. Hudson*, 125 Ind. 504.

We think it apparent from the facts alleged that the appellant received property to indemnify him against loss, in the payment of obligations upon which the appellees were equally liable as his co-sureties; that he converted the property into money; and, although the appellees were compelled to pay these obligations upon which they and the appellant were jointly liable, he did not account to them for their share of such indemnity.

The complaint states a cause of action, and the

court below did not err in overruling the demurrer thereto.

The other questions urged for our consideration arise on the ruling on the motion for a new trial. The appellees contend that none of the questions relating to the ruling are properly before the court for the reason that the evidence is not properly in the record.

We have before us, as the record in this case, a "complete transcript of the record and proceedings" of the court below, properly certified to as such by the clerk of the Knox Circuit Court. In this transcript are copies of the complaint and the demurrer thereto; the answers and the demurrers thereto; the replies; the verdict of the jury, with interrogatories and answers thereto; the motion for a new trial; the appeal bond, and a bill of exceptions containing the instructions, those asked and refused as well as those given; also copies of the order-book entries in said cause. This transcript, as already stated, is properly certified to by the clerk. Following this certificate of the clerk to such transcript is another certificate of the clerk wherein he certifies "that the annexed and subjoined longhand manuscript of the evidence in said cause taken by Helen Hinkle, the shorthand reporter in said cause, was filed in my office, December 21, 1893, and that the signature of E. A. Ely, the special judge thereto, is the genuine signature of said judge." Following this certificate is what purports to be a bill of exceptions containing the evidence as taken down in shorthand by Helen Hinkle, shorthand reporter, and by her transcribed into longhand.

The proper place for a bill of exceptions in a transcript, in order that it may be considered in the record, is some place before the certificate of the clerk, which should be at the end and not at the beginning of the transcript.

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The longhand manuscript of the evidence which is incorporated in what purports to be a bill of exceptions, as shown by the transcript before us, was, as the clerk certifies, filed in his office on the 21st day of December, 1893; but there is nothing, either by way of recital in the transcript, the certificate of the clerk, or any file mark, to show that after the longhand manuscript was incorporated in the bill of exceptions and signed by the court, the bill of exceptions was filed with the clerk of said court.

It is absolutely necessary that the record show affirmatively that the bill of exceptions was properly filed with the clerk after it had been signed by the court. To file the longhand manuscript of the evidence is not sufficient. The longhand manuscript of itself does not constitute a bill of exceptions; but after such manuscript is embodied into a formal bill, presented to and signed by the court, it becomes a bill of exceptions, and, when filed, becomes a part of the record. *Evansville Street R. W. Co. v. Meadows*, 13 Ind. App. 155; *DeHart v. Board, etc.*, 143 Ind. 363; *Ueker, Admx., v. Bedford Blue Stone Co.*, 142 Ind. 678; *Peerless Stone Co. v. Wray*, 143 Ind. 574; *Salem Bedford Stone Co. v. Hobbs*, 144 Ind. 146; *Miller, Admx., v. Evansville, etc., R. R. Co.*, 143 Ind. 570.

Again it is insisted that the evidence is not in the record because it was not filed, either in the form of the longhand manuscript or as a bill of exceptions, within the time designated by the court.

It appears from the record that the appellant was granted ninety days from June 26, 1893, to file his bill of exceptions. The clerk certifies that the longhand manuscript was filed in his office on the 21st day of December, 1893.

This objection seems to be well taken. *Mason v. Brody*, 135 Ind. 582; *Holt v. Rockhill*, 143 Ind. 530;

DeHart v. Board, etc., supra; Smith v. State, 145 Ind. 176.

If the bill of exceptions was in fact filed after it was signed by the court, and the clerk failed to make the transcript so state, the appellant has had ample time, since appellees' counsel raised the objection to considering it as in the record, to have had the transcript corrected.

The judgment of the court below is affirmed.

ON PETITION FOR REHEARING.

WILEY, J.—Appellant has filed a petition for rehearing in which he earnestly contends that the court in its original opinion, "overlooked the plain and unmistakable record," in holding that the bill of exceptions was not properly in the record, and could not be considered. In view of the earnest appeal of the appellant in his brief in support of his petition for a rehearing, we have examined the record with much care. The record shows that appellant's motion for a new trial was overruled June 26th, 1893, "*to which decision of the court the defendant at the time excepts, and ninety days' time is given in which to prepare and file his bill of exceptions.*" We have quoted the exact language of the record, from which it appears that the time for filing the bill of exceptions expired ninety days from June 26th, which would be September 23, 1893. Section 1476, Burns' R. S. 1894 (1410 Horner's R. S. 1896), provides: "Whenever, in any cause, such verbatim report shall have been made by an official reporter, the original longhand manuscript of the evidence, by him made, may be filed with the clerk of the court by the party entitled to the use of the same; and in case of an appeal to the Supreme Court, * * * * it shall be the duty of the clerk, if requested to do so by said party, to certify the said original manuscript of

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evidence, when the same shall have been incorporated in a bill of exceptions, to the Supreme Court or other court of appeal, instead of a transcript thereof; and the said original manuscript of evidence may be used in the Supreme Court or other court of appeals in the same manner and for all purposes in and for which a certified transcript thereof might heretofore be used." Under the provisions of the statute just quoted, and the repeated decisions of the Supreme and this court, it is the settled law in this State, that the original longhand manuscript of the evidence must be filed in the clerk's office before it is incorporated in a bill of exceptions, and the record must affirmatively show such filing. *DeHart v. Board, etc.*, 143 Ind. 363; *Joseph v. Wild*, 146 Ind. 249; *Carlson v. State*, 145 Ind. 650; *Rogers v. Eich*, 146 Ind. 235; *Smith v. State*, 145 Ind. 176; *Beaty v. Miller*, 146 Ind. 231; *Marvin v. Sager*, 145 Ind. 261; *Holt v. Rockhill*, 143 Ind. 530.

The only evidence in the record that the original longhand manuscript was ever filed in the clerk's office is the certificate of the clerk that "*the annexed and subjoined longhand report of the evidence in said cause * * * * * was filed in my office, December 21st, 1893.*" It appears therefore on the face of the record that the "longhand report of the evidence" was not filed in the clerk's office until nearly three months after the time fixed by the court for filing a bill of exceptions, and as such filing of the evidence must precede the filing of the bill of exceptions, it follows that the evidence is not properly in the record. Appellant contends under the provisions of section 641, Burns' R. S. 1894 (629, Horner's R. S. 1896), that delay of the judge in signing and filing the bill of exceptions, should not deprive the party objecting to the benefit thereof. In this contention appellant is right, but in

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this case appellant, by reason of the delay of the judge in signing the bill of exceptions, was not in any way harmed. The trouble here is, that the longhand manuscript of the evidence was not filed with the clerk before it was embraced in the bill of exceptions, and the further fact, that the bill, after having been signed by the judge, does not appear, from any file mark, any certificate of the clerk, or anything in the record, to have been filed in the clerk's office. The failure of the record to affirmatively show that the bill was filed in the clerk's office, after it had been signed by the judge, is fatal, and the bill is not properly in the record. *Evansville, etc., R. W. Co. v. Meadows*, 13 Ind. App. 155; *Davee v. State ex rel.*, 7 Ind. App. 71; *Gish v. Gish*, 7 Ind. App. 104; *Prather v. Prather*, 139 Ind. 570.

In the absence of an affirmative showing of these facts, we must hold, in harmony with the decisions quoted, that the evidence is not in the record.

Petition for hearing overruled.

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[No. 2012. Filed January 27, 1897.]

PLEADING.—*Complaint.*—*Master and Servant.*—The complaint in an action for the death of an employe need not allege want of knowledge of the danger on the part of the decedent, where he had been ordered to work out of the line of or away from the place of the work he was engaged to perform. *p. 632.*

SAME.—*Complaint.*—*Master and Servant.*—A complaint in an action for damages against an employer for negligently causing the death of an employe, alleging that the work at which decedent was engaged by the employer's orders when killed was entirely different from the work he was employed to do, and was more dangerous and hazardous, and had to be performed with different workmen, and with appliances and in a place different from those of the work

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he was employed to do, sufficiently shows that the decedent was killed while performing work which he was not originally employed to do. *pp. 632, 633.*

MASTER AND SERVANT.—Negligence.—An employe is not, as a matter of law, negligent in obeying his employer's order to perform a different kind of work from that which he was employed to perform with knowledge that it was more dangerous. *p. 633.*

APPEAL.—Presumption.—It will not be presumed on appeal that the plaintiff's intestate knew of certain defects in machinery in the face of an allegation in the complaint that he did not know of them.

MASTER AND SERVANT.—Duty of Master to Furnish Safe Working Place.—It is the duty of the master to furnish his employes with reasonably safe working places and with reasonably safe appliances with which to work, and to use every reasonable care to keep such places and appliances in such condition. *p. 634.*

PLEADING.—Complaint.—Negligence.—In an action for damages against an employer for negligently causing the death of an employe, a complaint containing an averment of negligence on the part of the defendant, and an averment of the want of contributory negligence on the part of the plaintiff's intestate is sufficient against a demurrer, unless the facts specifically stated in the complaint show the contrary. *p. 634.*

APPEAL AND ERROR.—Assignment of Errors.—Instructions.—An assignment that the court erred in giving a series of instructions designated by number "and to the giving of each of said instructions" is a several and not a joint assignment of errors. *pp. 635, 636.*

WITNESS.—Expert Testimony.—Life Insurance.—One who has been an agent and doing business for a life insurance company for eight years, and has been supplied by his company with tables giving the expectancy of life which he has used in his business, is competent to testify as an expert as to the expectancy of the life of a given person. *p. 635.*

MASTER AND SERVANT.—Knowledge of Defects.—Assumption of Risk.—Burden of Proof.—In an action for the death of an employe the burden is upon the plaintiff to show that his intestate had no knowledge of any defect in the machinery or appliances with which he worked; and that he had not assumed the risk of the danger. *p. 638.*

SAME.—Fellow Servant.—An employe, whose duty it is to apply the power for drawing a car loaded with rock up an incline to the top of cement kilns, and another employe, whose duty it is to give the signal as to when to apply the power and to attend to the unloading of the car, are fellow servants. *p. 639.*

APPEAL.—Verdict of Trial Court not Disturbed if Substantial Justice is Done.—A verdict will not be disturbed on appeal unless it appears that substantial justice has not been done. *p. 639.*

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From the Clark Circuit Court. *Reversed.*

M. Z. Stannard and Ward H. Watson, for appellant.

Laurent A. Douglass, for appellee.

HENLEY, J.—This was a suit for damages for negligently causing the death of appellee's decedent while working for appellant.

Counsel for appellant argue the insufficiency of the first paragraph of complaint because it fails to show decedent's want of knowledge of the dangerous defects which caused his death.

Ordinarily the servant does, as a part of his contract, assume the risk of all known dangers connected with his employment.

Pennsylvania Co. v. Witte, 15 Ind. App. 583, and cases therein cited; *New Kentucky Coal Co. v. Albani, Admr.*, 12 Ind. App. 497; *Ames, Admr., v. Lake Shore, etc., R. W. Co.*, 135 Ind. 363.

It is also true, as in those cases decided, that want of knowledge of the danger is an independent element of the plaintiff's case which must be affirmatively shown by the complaint. The rule, however, is not applicable where the servant is ordered to do work out of the line of, or away from the place of the work he is hired to perform. *Stuart v. New Albany Mfg. Co.*, 15 Ind. App. 184; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Louisville, etc., R. W. Co. v. Hanning, Admr.*, 131 Ind. 528; *Cincinnati, etc., R. R. Co. v. Madden*, 134 Ind. 462; *Pittsburgh, etc., R. W. Co. v. Woodward*, 9 Ind. App. 169; *Lynch v. Chicago, etc., R. R. Co.*, 8 Ind. App. 516; *Kentucky, etc., Bridge Co. v. Eastman*, 7 Ind. App. 514; *Evansville, etc., R. R. Co. v. Holcomb*, 9 Ind. App. 198.

While the terms of decedent's employment are not definitely stated in the complaint, nor any specific

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averment made as to just what work he was to perform under it, yet it is directly and pointedly alleged that the work at which he was engaged by the master's orders when killed, was entirely different from the work which he was employed to do, and was more dangerous and hazardous than such work, and had to be performed with different workmen operating under different rules and methods, and with appliances, and in a place distinct and different from those of the work which decedent was employed to do. These averments entirely exclude the possibility of the work, in the performance of which decedent was killed, being the same as that which decedent was originally employed to do.

Nor can it be said that decedent was necessarily negligent by reason of his obeying the master's orders, with knowledge of the additional hazard of the new work. The Supreme Court in *Brazil Block Coal Co. v. Hoodlet*, *supra*, say:

"When a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent risk is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages."

This court is of the opinion that the first paragraph of complaint stated facts sufficient to consti-

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tute a cause of action, and therefore the lower court did not err in overruling the demurrer thereto.

The second paragraph of complaint proceeds upon the theory that appellant did not provide the decedent with a safe working place and appliances, and directly avers that the machinery with which decedent worked was so constructed that decedent was exposed constantly to danger, all of which was unknown to decedent and was known to appellant. That the decedent's death was caused by the wrongful act and negligence of appellant and without any fault or carelessness of decedent. This court will not presume that the decedent knew of the defects in the machinery, if any there were, in the face of the allegation in the complaint that he did not know of them. *Bedford Belt R. W. Co. v. Brown*, 142 Ind. 659.

That the master must use reasonable care to provide his employes with reasonably safe working places, and with reasonably safe appliances with which to work, and to use every reasonable care to keep such places and appliances in such condition, is the undisputed law of the State, and has been so repeatedly held by this court and the Supreme Court of this State that argument for and against the proposition, and citation of the authorities, become useless.

It is also well settled in this class of actions that the averment of negligence on the part of the defendant, and the averment of the want of contributory negligence or knowledge of dangerous defects by the plaintiff is to be deemed sufficient against a demurrer, unless the facts specifically stated in the complaint show the contrary. *Chicago & Erie R. W. Co. v. Wagner* (Ind. App.), 45 N. E. 76; *Evansville, etc., R. R. Co. v. Malott*, 13 Ind. App. 289; *Eureka Block Coal Co. v. Bridgewater*, 13 Ind. App. 333.

And that the general averment of knowledge or

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want of knowledge includes both actual and imputed knowledge. *Pennsylvania Co. v. Witte, supra.*

The lower court properly overruled the demurrer to the second paragraph of complaint.

We have examined the question of the competency of the evidence of the witness, Thomas B. Rader, objected to by appellant, and are of the opinion that the witness had sufficient experience and showed himself sufficiently familiar with the subject about which he testified, to make him competent as an expert in the matter testified about. This witness testified that he had been in the life insurance business eight or ten years; that he was supplied by his companies with tables giving the expectancy of life; that he used the same in his business; and, over the objection of appellant's counsel, was permitted by the court to refer to his tables and tell the jury the decedent's expectancy of life. We think the witness competent and the testimony proper. *Shover, Admr., v. Myrick*, 4 Ind. App. 7.

Appellant contends that the court erred in giving certain instructions to the jury, and one of the reasons assigned for the new trial herein is as follows:

"That the court erred in giving to the jury instructions numbered 1, 2, 3, 4, and 5, of the series of instructions given to the jury in said cause, by the court of its own motion, and in giving each of said instructions.

"That the court erred in giving to the jury instructions numbered 1, 2, 3, 4, 5, 5 1-2, 6, 7, 8, 9, 10, and 11, of the series of instructions tendered to the court by the plaintiff, and given by the court to the jury at the plaintiff's request, and in giving each of said instructions."

Counsel for the appellee argue that the foregoing assignments are joint, and that if either of the instructions named therein was properly given the error

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in giving any other instruction named therein would not be noticed by the court. The rule stated by counsel is correct where the assignment is joint. *Tegarden, Admr. v. Phillips*, 14 Ind. App. 27.

But in this case the assignment is several, being made so by the closing words, "and in giving each of said instructions."

Taken as a whole, we do not believe the instructions given by the court stated the law unfairly to the appellant.

The evidence in the cause establishes the following facts: That decedent was a man thirty-three years of age, in good health, intelligent, and possessed of all his faculties; that he had worked about cement mills for ten years and probably longer; that the greater portion of this time he was engaged in that portion of the business known as "coaling;" that he was thoroughly familiar with the duties of a coaler; that he was employed to work for appellant under a general employment, to do whatever work was to be done about the mill; that it was stipulated in the contract of employment that decedent should have one dollar and thirty-five cents per day for work in the quarry, and one dollar and seventy-five cents per day for work as coaler; that during the time he was employed by appellant he ran the steam drill, drilled, sledged, and loaded rock, headed barrels, tied sacks, drew lime, and coaled; that during the time he worked for appellant, covering about twelve months, he worked as coaler upon as many as thirteen different periods of time, and received under the contract the stipulated coaler's wages; that while engaged in the work of coaling the kilns he received the injury from which he died; that decedent was alone when the accident occurred. The evidence further shows that a part of the duties of the coaler was to attend to the

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drawing up of the car, and dumping the rock, with which the car was loaded into the cement kilns. These kilns were circular in shape, built of sheet iron and lined with fire brick, and stood five in a row. The car loaded with rock reached the top of the kilns by means of an incline, upon which there was a track for the car to run, and the incline and track began at the quarry near by, and extended to the top of and across and over the tops of all the cement kilns; the car with its load was drawn up the inclined track and over the kilns by a wire rope and friction pulley controlled and operated by the crusher feeder in the crusher room, situated a short distance from the kilns; on the top of the kilns and extending along the track upon which the car ran, was a walkway for the use of the coaler, and in the performance of his duties it sometimes became necessary for him to leave the walkway and cross the track; that there was a wire extending from the top of the kilns where the coaler worked, into the crusher room which connected with a bell which was used for giving signals between the coaler and the crusher feeder; that decedent was acquainted with the manner and mode of giving the signals, and the effect of the same; that while decedent was upon the track and between the end of the car and the power, the car not yet having been taken back down the incline by the horse power provided therefor, after the same had been unloaded, the signal was given the crusher feeder to apply the power to draw up the car; the power was applied and the car, already up, was pulled off over the end of the track and over the last kiln to the ground, thus striking decedent and inflicting injuries from which he died. The evidence shows that decedent was acquainted with his surroundings, and if, as the appellee claims, the machinery was defective, the evidence shows no such de-

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fects; and the defects claimed and pointed out in the counsel's argument were certainly such as were equally open to the observation of both master and servant.

The burden of proof is upon the servant to show that he had no knowledge of any defect in the machinery or appliances with which he worked. *Chicago etc., R. W. Co. v. Wagner, supra.*

The evidence clearly shows that the decedent was working at the time of his death in the regular line of his employment, and that in doing such work he assumed the dangers incident thereto.

The burden of proof is upon the servant to show that he had not assumed the risk of the danger. *Louisville, etc., R. W. Co. v. Quinn*, 14 Ind. App. 554.

In *Jenney Electric, etc., Co. v. Murphy*, 115 Ind. 566, Mitchell, J., says: "What he [the master] especially engages is, that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to and within the ordinary risks of the service which he has undertaken. There is another equally well settled principle correlative to the rules which define the duties of the employer, which holds the employee to the assumption of all risks naturally and reasonably incident to the service in which he embarks, so far as the hazards of the service are obvious and within the apprehension of a person of his experience and understanding."

And if an employe voluntarily uses a defective implement, the defect being alike open and obvious to employer and employe, the employe cannot maintain an action for an injury resulting from the use of such implements.

The evidence, we think, also shows that decedent and the crusher feeder were fellow servants.

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There was no evidence offered to prove or tending to prove that the appliances used by appellant were not such as were commonly used by other mills of similar purpose, or that the appliances could have been rendered less dangerous in their operation; nor were there any seeming defects pointed out that were not equally open and obvious to employer and employe.

If decedent gave the signal to apply the power while standing upon the track he was guilty of contributory negligence; if he gave the signal and then stepped upon the track he was guilty of contributory negligence; if his fellow servant, Bates, in the crusher room applied the power without the signal or by a mistaken signal, decedent's administrator cannot recover because decedent's death would be the result of the act of a fellow servant.

It is the rule of the Supreme Court of this State, and of this court, that after the circuit court has finally passed upon the verdict of the jury, all presumptions are in its favor, and this court will not interfere unless it clearly appears that substantial justice has not been done. In reversing the cause we do no violence to this rule. The evidence in this cause in our opinion does not establish the material averments of either paragraph of the complaint.

The judgment is reversed with instructions to sustain the motion for a new trial.

BLACK, J., was absent.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY
COMPANY v. BOYTS.

[No. 1,881. Filed January 28, 1897.]

NEGLIGENCE. — Damages. — Contributory Negligence. — Burden of Proof.—In an action for damages based upon the negligence of the defendant it does not devolve upon defendant to show that plaintiff was guilty of contributory negligence, but the burden is on plaintiff to show, not only the negligence of the defendant, but also his own freedom from any negligence contributing to the injury. *p. 646.*

SAME. — Railroads.—It is negligence to back an engine and cars across a street of a town at the rate of eight miles an hour, with no person on the car and without sounding the whistle or ringing the bell, and without giving any warning of its approach. *p. 646.*

SAME. — Imputed Negligence.—Where one, as a guest, accepts an invitation to ride in the vehicle of another, without any authority to control or direct the movements of the driver thereof, or without any reason to doubt that the driver is skillful and competent, the negligence of the owner or driver will not be imputed to the guest so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury. *p. 647.*

SAME. — Contributory Negligence. — Approaching Railroad Crossing.—Where one is riding in a vehicle as the guest of the driver, it is no less his duty than it is the duty of the driver when approaching a railroad crossing to look and listen to learn of danger and avoid it, if practicable. *p. 648.*

SAME. — Approaching Railroad Crossing. — Contributory Negligence.—One riding in a vehicle as the guest of another who neither looks nor listens on approaching a railroad crossing with which he is familiar, although he knows that a train has arrived at the station near the crossing, and has an unobstructed view of a sidetrack for a distance of 80 feet when 20 feet from the track, and who gives no notice to the driver, is guilty of such contributory negligence as will prevent a recovery for an injury caused by a train backing over the crossing on such sidetrack. *pp. 650-656.*

From the Elkhart Circuit Court. *Reversed.*

Francis E. Baker and *Charles W. Miller*, for appellant.

James D. Osborne and *Aaron S. Zook*, for appellee.

ROBINSON, J.—The facts in this case as found by the jury are in substance as follows: The appellant's railroad track runs through the town of Constantine, Michigan, in a general north and south direction, and parallel to and west of the main track is a side track. Centerville street, in said town, crosses the main track and sidetrack at grade in a general east and west direction. The appellant's depot building is 280 feet north of the Centerville street crossing. The appellee was familiar with the crossing where the accident occurred, and with the location of tracks and buildings as they existed on that day, and for ten months prior thereto. The sidetrack terminated and connected with the main track 485 feet south of the Centerville street crossing. Station street, in said town, connects with Centerville street from the north, 65 feet west of the railroad tracks, and extends north, in the general direction of the railroad tracks, to a point west of the depot buildings, and then bears off somewhat to the left looking north. The railroad tracks were laid on a curve extending from the depot to the end of the sidetrack south of the crossing, the outer side of the curve being west. The two tracks were the only railroad tracks at the crossing. The ground north of Centerville street, and between Station street and the railroad tracks up to the depot building was vacant and unoccupied, except for some logs lying thereon, but these logs would not prevent a person proceeding southward along Station street, either riding in a cutter or walking, from seeing engines and cars on the tracks to the east and southeast of him. The appellee knew of these logs being there before January 14, 1893. On the south side of Centerville street, and six feet eight inches west of the west rail of the sidetrack, is a lime house. On the same

side of Centerville street and west of the lime house is a lumber office. These buildings would not prevent a person in a cutter, who was on Centerville street until within about 20 feet of the railroad tracks, and also on Station street for about 100 feet north of Centerville street, from seeing an engine and cars approaching on the sidetrack from the south of Centerville street until such engine and cars came within about 40 or 50 feet of the northeast corner of the lime house. A person driving south on Station street, when at a point about 200 feet north of Centerville street, and opposite the depot could see an engine and cars approaching from the south on the sidetrack for about 65 feet south of the northeast corner of the lime house. A person driving south on Station street, when at a point about 185 feet north of Centerville street, could see an engine and cars approaching from the south on the sidetrack for about 60 feet south of the northeast corner of the lime house. The appellee approached the crossing coming southward along Station street, and then eastward on Centerville street, seated on the left hand side in a cutter, with a friend named Hamilton, on the right side; the cutter being drawn by two horses, the cutter and horses being the property of Hamilton and the team being at the time driven by him. Appellee came upon Station street more than 240 feet north of Centerville street, and had his ears covered with ear muffs, or ear tips, while he was in the cutter, up to the time of the accident. The team was driven all the way south on Station street, and east on Centerville street "on a good trot" until the heads of the horses were at the west rail of the sidetrack. While going south on Station street the appellee looked straight ahead and to the left toward the depot. On Centerville street the appellee looked straight ahead, and did not see the engine and cars

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until they were within one or two feet of the heads of the team. On the day of the accident the appellee was in full possession of his senses of sight and hearing. While riding southward on Station street, appellee did not see the engine and cars at the switch, or at any point between the switch and the Centerville crossing and the sidetrack. The train was a local freight train and came into Constantine on the main track from the north at about its usual time, and stopped at the station. The engine with two cars went south along the main track to the switch south of the crossing, and backed in on the sidetrack. Part of the train left standing on the main track projected south beyond the south end of the depot building, which part the appellee saw while riding along Station street. Appellee knew that a local freight came from the north at that time. At the time appellee saw that portion of the train on the main track he did not know that the engine had gone south on the main track. The appellee knew the location of the switch. The engine was equipped with a steam whistle and bell, as required by a law of the state of Michigan. There was no city or town ordinance requiring the sounding of the whistle within the limits of Constantine, nor prohibiting the running of trains faster than six miles per hour. As the engine and car backed in on the sidetrack and upon the street crossing, there was no brakeman upon the rear car, nor was the engine bell ringing. The employes of the company stopped the engine and cars as soon as possible after the team and cutter came in sight, east of the line of the lime house. The appellee approached the tracks in the center of Centerville street, which is 33 feet from the north line of the lime house. A person in the center of Centerville street, when twenty feet west of the nearest rail, can see a car approaching from the south on the side-

track a distance of 80 feet from the center of Centerville street, and at a distance of 30 feet west of the nearest rail, can see a car approaching a distance of 60 feet from the center of Centerville street. Neither when appellee was at the point 30 feet west of the nearest rail, nor when 20 feet west of the nearest rail, nor at any time between these points, did he look south to see whether an engine and cars were approaching. Appellee "told Hamilton to look out, there might be a train." In approaching the crossing the appellee did nothing to prevent an accident at the crossing. The accident occurred at about half past three in the afternoon. It was a clear, quiet, cold day. There were sleigh bells on the team which rang as the team trotted. As the heads of the horses reached the west rail, the team turned and went northward, parallel with the track and west of it. The car struck one of the horses and the team fell. Appellee was in the cutter after the team fell, but he was not struck by the cars or engine. The appellee alighted from the cutter on his feet and hands in the snow eight or ten inches deep. The appellee did not at any time prior to the time the horse was hit by the car attempt to get out of the cutter nor attempt to stop the cutter. The ailments the appellee complains of were caused by this accident. On the south side of Centerville street, coming flush to the south line or edge of the street, and being within seven feet west of the west rail of the switch line, there was a building known as the plaster or lime house. About ten feet west of this building was a building known as the lumber office. It is about 70 feet from the point where the center of Station street intersects the center of Centerville street to the west rail of the switch track. These buildings obstructed the view so that a person, riding in a cutter on Station street, and east on Cen-

terville street, could not see the approach of an engine or car coming north on the sidetrack at any point between the switch and the place at which the car would emerge to view in front of the northeast corner of the plaster house. The appellee traveled in the center of said streets. The team and cutter belonged to Hamilton, who was at the time driving and who was a competent and careful driver. Appellee had no control over, or right to control Hamilton or the team. As the cars were being pushed north from the switch the engine bell was not ringing nor was any other signal given. It was down grade from the switch northward to the crossing. The cars were being pushed at the rate of eight miles per hour, and made less than the usual amount of noise. The injuries referred to in the complaint were the injuries received by appellee at the time mentioned. When in the center of Centerville street, about 70 feet west of the switch track, the appellee said to Hamilton, "You better hold up, there might be a train coming," or words to that effect. Centerville street was much traveled at that time, was 66 feet wide, and was the main thoroughfare leading from the village to the country east and south. There was no flagman or gates at the crossing. Hamilton did not stop his team before reaching the crossing. From the horses' heads to where Hamilton sat in the cutter was about 16 feet. When appellee spoke to Hamilton to hold up, appellee braced his feet to prepare to spring out in case there should be danger. Appellee jumped out of the cutter as soon as he could after the advancing cars appeared to view. The damages were fixed at \$400.00.

Upon the special verdict the appellant moved for a judgment in its favor, which was overruled by the court and judgment rendered in favor of the appellee for the sum of four hundred dollars.

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The appellant has assigned errors as follows: "1. The court erred in overruling appellant's motion for judgment in its favor on the special verdict returned by the jury. 2. The court erred in rendering judgment in favor of appellee for the sum of four hundred dollars on the special verdict returned by the jury."

It is firmly settled by the Supreme Court of this State that in an action of this kind contributory negligence on the part of the plaintiff is not a matter that the defendant must establish; but that the plaintiff must allege in his complaint and prove that the injury was incurred without his own negligence, having contributed thereto. The burden is on him to show, not only the negligence of the defendant, but also his own freedom from any negligence contributing to the injury.

Appellant's counsel insist in their brief that the special verdict fails to show any negligence on the part of the railroad company.

The facts found by the jury show that at the time of the accident there was in force a law of the state of Michigan requiring the appellant to sound the whistle twice, at least 40 rods before a crossing was reached, and to ring the bell continuously until the crossing was passed under a penalty of \$100.00 for every neglect. But in the absence of any statute it was the duty of the appellant to give reasonable and timely warning as it neared the crossing. Hence, to back an engine and cars across a street in a town at the rate of eight miles an hour, with no person on the car, and without sounding the whistle or ringing the bell, and without giving any notice or warning of its approach is sufficient to establish negligence on the part of those operating the train. *Pittsburgh, etc., R. R. Co. v. Burton*, 139 Ind. 357; *Louisville, etc., R. W. Co. v. Rush*, 127 Ind. 545; *Cincinnati, etc., R. R. Co. v. Butler*, 103

Ind. 31; *Louisville, etc., R. R. Co. v. Schmidt*, 126 Ind. 290.

It appears from the special verdict that the appellee was the special guest of his neighbor, Hamilton, who was found to be a competent and careful driver, and with whom appellee was riding. The team and sleigh, or cutter, belonged to Hamilton. As they turned into Centerville street about seventy feet from appellant's tracks, the appellee "told Hamilton to look out, there might be a train." In view of the facts found it seems to us clear, beyond question, that Hamilton, the owner and driver of the team, was guilty of negligence in attempting to cross the railroad tracks in the manner he did. And it is contended by counsel for the appellee that inasmuch as the appellee was simply the guest of the driver and had no control over the team, the driver's negligence can not be imputed to him.

Whatever may be the law in other jurisdictions the rule prevails in this State that where one, as a guest, accepts the invitation to ride in the vehicle of another without any authority to control or direct the movements of the driver, or without any reason to doubt that the driver is skillful and competent, the negligence of the owner or driver will not be imputed to the guest so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury. *Brannen v. Kokomo, etc., Gravel Road Co.*, 115 Ind. 115; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *City of Michigan City v. Boeckling*, 122 Ind. 39; *Town of Knightstown v. Musgrove*, 116 Ind. 121; *Town of Albion v. Hetrick*, 90 Ind. 545; *Louisville, etc., R. R. Co. v. Creek*, 130 Ind. 139; *Board, etc., v. Mutchler*, 137 Ind. 140; *Lake Shore, etc., R. W. Co. v. McIntosh*, 140 Ind. 261.

But even if the negligence of the driver, Hamilton,

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cannot be imputed to the appellee, and as shown by the above cases it cannot be, the appellee must still show that he was free from negligence contributing to his injury. And the same rule would not apply where the guest was riding inside a closed carriage without opportunity to discover danger and inform the driver of it, that would apply where the guest was seated at the driver's side, and had the same opportunity with the driver to discover and avoid danger. *Brickell v. New York, etc., R. R. Co.*, 120 N. Y. 290. Although he may be simply a guest, if he has the opportunity to do so, it is no less his duty than it is the duty of the driver when approaching a railroad crossing, to look and listen and to learn of danger and avoid it if practicable. He has the burden of establishing, affirmatively, freedom from contributory negligence, or as said in the opinion of *Tollman v. Syracuse, etc., R. R. Co.*, 98 N. Y. 202, that plaintiff "approached the crossing with prudence and care, and with senses alert to the possibility of approaching danger."

In *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280, where a daughter, injured at a railway crossing, was riding in a buggy drawn by a horse driven by her father, it was held error to refuse the following instruction: "The burden is on the plaintiff to show by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover."

In the case of *Hoag v. New York, etc., R. R. Co.*, 111 N. Y. 199, in speaking of a case where the wife was seated in a wagon drawn by a team which her husband was driving, it was said, "If they did not see it [the train], or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen,

and the facts show that if she had looked, she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe." This statement was approved in *Miller, Admr., v. Louisville, etc., R. R. Co.*, 128 Ind. 97; *Allyn v. Boston, etc., R. R. Co.*, 105 Mass. 77.

In *Miller, Admr., v. Louisville, etc., R. R. Co.*, *supra*, which was an action by a wife, injured at a railway crossing while riding in a wagon with her husband, who was driving, it is said: "The intestate approached a crossing known to her to be dangerous, and approached it when a train was in full view; she took no precautions to warn her husband or to avert the threatened danger, although slight care might have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care."

In *Cadwalader v. Louisville, etc., R. W. Co.*, 128 Ind. 518, the appellee kept a watchman at the crossing who gave no notice to the appellant that a train was approaching. Before entering upon the crossing, with which the appellant was familiar, she did not look for approaching trains, but looked at the watchman stationed at the crossing. At the time of the injury the appellant was a person of ordinary intelligence, and possessed of good hearing and good eyesight. When within twenty feet of the railroad track the appellant had an unobstructed view of the track for the distance of one hundred feet north, and when within ten feet of the track she had an unobstructed view for the distance of three hundred feet, and could have seen the approaching train before she stepped upon the track had she looked. "It has been repeatedly decided," says Coffey, J., speaking for the

court, "by this and other courts of last resort, that one who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured. Indeed the principle is so well settled, and is so firmly fixed in our jurisprudence as not to need further elaboration." *Ohio, etc., R. W. Co. v. Hill*, 117 Ind. 56; *Indianapolis, etc., R. W. Co. v. Wilson*, 134 Ind. 95; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Chicago, etc., R. W. Co. v. Hedges*, 118 Ind. 5; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279; *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *Mann v. Belt, etc., R. R. Co.*, 128 Ind. 138.

In view of the above well settled law of this State, and, reasoning therefrom, we fail to see any difference in principle between relying upon the watchman in the one case and upon the driver in the other. The negligence of neither the watchman nor the driver can be imputed to the traveler, but it certainly could not be said that the traveler could excuse himself by exercising a less degree of care when relying upon the driver than when relying upon the watchman.

The special verdict finds that the appellee was riding in a cutter seated in the same seat with the driver and upon the driver's left. He was then and for ten months had been familiar with the crossing and the surroundings with reference to location of tracks and buildings. His sight and hearing were good. He entered upon Station street more than 240 feet north of Centerville street. While riding south on Station street the appellant did not simply look straight ahead, but looked to the left towards the depot. While riding on Centerville street he looked straight ahead. While riding east on Centerville street he did not see

the engine and car approaching the crossing until they were within one or two feet of the team. The lime house and lumber office on the south side of Centerville street, and west of the railroad tracks would not prevent a person in a cutter who was on Centerville street east of Station street until within about twenty feet of the railroad tracks, and also on Station street for about 100 feet north of Centerville street, from seeing an engine and cars approaching on the sidetrack from the south of Centerville street until they came within about 40 or 50 feet of the northeast corner of the lime house. At a point on Station street about 200 feet north of Centerville street a person could see an engine and cars approaching from the south on the sidetrack for about 65 feet south of the northeast corner of the lime house, and at a point about 185 feet north, could see an engine and cars about 60 feet south. A person in the center of Centerville street, when 20 feet west of the nearest rail, can see a car approaching from the south on the sidetrack a distance of 80 feet from the center of Centerville street, and when 30 feet west, can see a car 60 feet. Appellee approached the railroad tracks in the center of Centerville street, and neither when 20 feet west of the nearest rail nor when 30 feet west of the nearest rail, and at no place between said points, did he look south to see whether an engine and cars were approaching.

The above is the finding of the jury as to what the appellee did in the way of looking and as to his opportunity to see if he had looked.

The rule laid down in *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25, has been approved in many subsequent cases as follows: "When a person crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show

affirmatively, that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury.'” *Cincinnati, etc., R. R. Co. v. Butler, supra; Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449; *Cincinnati, etc., R. W. Co. v. Duncan*, 143 Ind. 524; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Shirk v. Wabash R. R. Co.*, 14 Ind. App. 126.

The verdict shows that there were some obstructions to the view south of the crossing but it also shows that these obstructions were not so great as to shut out all sight. The fact that the appellee had his ears covered with ear muffs, or ear tips, and that there were sleigh bells on the team, ringing, imposed the duty of increased care in the use of the sense of sight. Beach, *Contrib. Neg.* (2d ed.), section 183, and cases cited. It is shown that as the engine and cars backed north on the sidetrack, and approached the crossing, they made much less than the usual amount of noise and rumbling sound, but there is no finding that the appellee listened for the train or that he could not have heard it had he listened.

In *Stewart v. Pennsylvania Co.*, 130 Ind. 242, the court says: “A person is bound to use the senses, and exercise the reasoning faculties with which nature has endowed him. If he fails to do so, and is injured in consequence, neither he, in life, nor his representatives after his death, can recover for resulting injuries.”

In *Smith v. Wabash R. R. Co.*, *supra*, Monks, J., speaking for the court says: “It is settled law in this jurisdiction, that when one approaches a point where a highway crosses a railroad track on the same level, it is his duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any kind, he must exercise ordinary care under the circumstances, in so doing. He must assume that

there is danger and act with ordinary care and prudence upon that assumption.

"The law defines precisely what the term ordinary care, under the circumstances, shall mean in these cases. The question of care at railway crossings as affecting the traveler, is no longer, as a rule, a question for the jury. The *quantum* of care in a large class of cases is exactly prescribed as a matter of law.

"In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively both ways for approaching trains, if the surroundings are such as to admit of that precaution. If a traveler by looking could have seen an approaching train in time to avoid injury, it will be presumed in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw, such conduct is negligence *per se*." *Cincinnati, etc., R. R. Co. v. Duncan, supra*; *Ohio, etc., R. W. Co. v. Hill, supra*; Beach, Contrib. Neg. (2d ed.), sections 180, 181 and cases cited.

It appears affirmatively that the appellee did not look, except once, toward the depot, before entering upon the crossing, and that he did not see the engine and cars until they were within one or two feet of the team, at which time he attempted to jump out of the cutter, and it does not appear that before entering upon the crossing he listened at any time for an approaching train, nor does it appear that listening would have availed anything. Taking these facts in connection with the further facts that the appellee was familiar with the crossing and its surroundings, that he knew when approaching the crossing the time of the arrival of a local freight train from the north, that he knew the train had arrived, a part of which, without the engine, he saw standing at the depot, we cannot say that he exercised that care and prudence

which the law of this State exacts of one approaching a railroad crossing.

Disregarding the finding of the jury that the appellee did nothing in approaching the crossing to prevent an accident, we are still unable to conclude from the special finding that the appellee did all that a reasonably prudent man would be expected to do under the circumstances. In the very able brief presented by counsel for the appellee it is insisted that as the appellee was the guest of the driver he did all that a man would do ordinarily, when he said to the driver, "you better hold up, there might be a train." There is nothing to show that the driver knew that any train was near. But the appellee knew, when he spoke to the driver, that the train had arrived at the depot from the north, that the engine had been detached from the train, and that a part of the train without the engine was then standing at the depot. With no further communication with the driver and without looking to the right or left he braced his feet to spring out if he should see any danger, and looking straight ahead rode until the engine and car were within one or two feet of the team. While it is said that the act of the appellee in bracing his feet to jump from the cutter if danger appeared, was an effort on his part to avoid injury, yet it can be said with equal propriety that by such conduct he realized the presence of danger, and without taking any precautions concluded to take the risk. Had the appellee looked southward, when within 30 feet of the nearest rail, he would have had an unobstructed view of the sidetrack a distance of 60 feet from the center of the street. It must be presumed that he knew this fact for the finding shows he was familiar with the crossing and its surroundings. "When it is said that a person approaching a railroad crossing must look and listen

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attentively for approaching trains, it is not to be understood that he may look from a given point, and then close his eyes; but it is to be understood that he must exercise such care as a reasonably prudent person, in the presence of such a danger, would exercise to avoid injury.

"The courts cannot close their eyes to matters of general notoriety, and to matters of every-day observation." *Mann v. Belt, etc., R. R. Co.*, 128 Ind. 138.

It is argued that the appellee was under no obligation to look to the south, as he was on the north side of the cutter, and in support of this, counsel cite *Cincinnati, etc., R. W. Co. v. Grames*, 8 Ind. App. 112. But in that case the brother of the appellee, who was driving the team, spoke to the appellee, directing him to keep a watch on the north side while he looked and listened for engines and cars on the south side. The driver and the appellee in that case were making mutual arrangements for their joint protection. While in this case it appears the driver did not look at all, nor did he request the appellee to look. No excuse is given for his failure to look both ways as he approached the crossing. He was familiar with the crossing and the surroundings, and was bound to use more care than if he had not previously known it. In the case of *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39, it is said: "In approaching a crossing, the law requires that the traveler shall listen for signals, must take notice of the signs put up as warnings, must look attentively up and down the track, if the surroundings are such as to admit of this precaution, and he must not attempt to cross in front of a moving train.

"If he neglects these precautions, and by reason of such negligence is injured, the court will adjudge,

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as a matter of law, that he has been guilty of contributory negligence."

The failure on appellee's part, under the circumstances, to vigilantly use his senses of sight and hearing to ascertain whether a train was approaching, was a neglect on his part to use such precaution as the law of this State requires. When within thirty feet of the crossing, he had an unobstructed view of the sidetrack, looking south a distance of 60 feet, which increased as he approached the track to 80 feet, at 20 feet from the track. He could have seen if he had looked. The burden was on him to show that he listened for an approaching train, or that listening would have availed nothing. This he has failed to do. We think the conclusion necessarily follows from the finding that the appellee was injured because he neglected these precautions which the law required of him, and by reason of that neglect "the court will adjudge, as a matter of law, that he was guilty of contributory negligence."

We think the verdict is insufficient to support the judgment rendered in favor of the appellee, and that the appellee was guilty of negligence which contributed to his injury.

Judgment reversed with instructions to sustain appellant's motion for a judgment in its favor.

TOWN OF SALEM v. MCCLINTOCK ET AL.

[No. 1,965. Filed January 28, 1897.]

PRINCIPAL AND SURETY.—*Bonds*.—Where duties are imposed upon a principal in a non-official bond, which are not commonly attached to the position which he is filling, and no mention of such unusual or different duties is made in the condition of such bond, the sureties thereon can only be held for the default of the principal in the

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performance of such duties as are commonly understood to belong to the class of employment by which the principal is designated. pp. 660, 661.

SAME.—*Extension of Liability of Surety by Implication.*—Sureties are favorites of the law and are not bound beyond the terms of the engagement, and their liability cannot be extended by implication beyond the strict terms of the contract. p. 661.

OFFICERS.—*Bonds.*—*Water Works Superintendent.*—*Liability of Sureties on Bond of.*—The sureties on the bond of a water works superintendent of a town are not liable for his default in failing to account for water rents collected by him, in the absence of any resolution or ordinance fixing the duties of such superintendent, or any condition in the bond sued upon authorizing him to collect water rents, although his contract of employment provides for such collection, as the collection of water rents forms no part of the duties of superintendent in the ordinary meaning of the word. p. 662.

From the Washington Circuit Court. *Affirmed.*

S. H. Mitchell and R. B. Mitchell, for appellant.

David M. Alsbaugh, John C. Lawler and Harvey Morris, for appellees.

HENLEY, J.—Appellant filed its complaint in the lower court in four paragraphs, against Charles McClintock, Edward W. Barrett and Fred L. Prow, seeking to charge them as sureties upon four separate bonds executed by one Elkana Craycraft, as principal, and McClintock, Barrett and Prow as sureties. Appellees demurred jointly and separately to each paragraph of the complaint, all of which demurrers were by the court below sustained, and the appellant refusing to plead further, the court rendered judgment upon demurrer.

The only error assigned in this court is the ruling upon the demurrers.

Each paragraph of the complaint declares upon a separate bond; appellees McClintock and Prow being sureties on the bonds executed in 1891, 1892, and 1894, and McClintock and Barrett upon the bonds executed

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in 1893. Elkana Craycraft, the principal in all the bonds declared upon, is now dead, and died prior to the commencement of this action.

The appellant is an incorporated town, and is the owner of a system of water works for supplying its inhabitants with water and for protection against fire, and by written contract employed Elkana Craycraft to superintend such water plant.

The contract entered into between appellant and Craycraft is as follows:

"This contract made and entered into by and between the town of Salem, in Washington county, Indiana, and Elkana Craycraft, of Salem, Indiana, witnesseth, that the said town of Salem, by its proper officers, has this day employed the said Craycraft to serve as superintendent of the water works of said town for the period of one year from the 3d day of October, 1893, and in consideration of the faithful performance of the service hereinafter specified by said superintendent, said town agrees to pay said Craycraft the sum of \$374.50 per year, the same to be allowed and paid in monthly installments. The duties required of said superintendent under this contract of employment are as follows, viz: He shall attend to and do all the pumping required. He shall collect water rents, and shall keep a water-works ledger, and open and keep an accurate account with each water consumer. He shall make and keep up all necessary repairs for said water-works system. He shall attend to the slushing out of the hydrants and pipes of said system, and especially the dead ends thereof, as often as is necessary to keep the water pure and wholesome. All material to be used for repairs is to be furnished by said town without any intervening agency, and no bills for repairs will be allowed by the Board of Trustees of said town without being first

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authorized by said board, and finally such superintendent is to discharge all duties usually devolving upon such an official and not specifically herein enumerated.

“Witness the seal of said contractor, and the name of the President of said Board of Trustees, attested by the clerk of said town this third day of October, 1893.

[SEAL.]

ELKANA CRAYCRAFT,
CHAS. A. ALLEN, Pres.

Attest: JOHN W. SPAULDING, Town Clerk.”

And to secure the faithful performance of his duties as superintendent of the water-works of the town of Salem the said Craycraft and his sureties at different times executed four several bonds covering all the time said Craycraft was such superintendent, which bonds are all alike, and are in words and in figures as follows:

“State of Indiana, Washington county: Know all men by these presents that we, Elkana Craycraft, Charles McClintock and Fred L. Prow are held and firmly bound unto the trustees of the town of Salem, in the State of Indiana, in the sum of one thousand dollars (\$1,000.00) for the payment of which we bind ourselves, our heirs and personal representatives. The consideration of the foregoing bond is such that whereas the above bound Elkana Craycraft has been employed or elected superintendent of the water-works of the town of Salem, in Washington county, Indiana; now if the said Craycraft shall faithfully and impartially discharge his duties as such superintendent of the water works, according to law and contract, then this bond shall be void, otherwise to remain in full force and effect.”

Which several bonds in words as above set out were signed and acknowledged by the principal and the

sureties, the appellees herein. Appellant seeks to recover from the sureties on said bonds, moneys collected as water rents by said Craycraft, which he appropriated to his own use and failed to account for.

The bonds declared upon in appellant's complaint are not official bonds; but the trustees of the town had the right to employ Craycraft as a superintendent in the management of the water works, and to accept a bond from him conditioned for the faithful performance of his duties as such superintendent, and he became in no sense an officer of the town by such employment. Section 4257, Burns' R. S. 1894; *City of Lafayette v. James*, 92 Ind. 240.

There is nothing in the record of this cause showing that the trustees of the town of Salem had by ordinance or resolution created the office of superintendent of the water works, or by any ordinance or resolution defined or attempted to define the duties of a superintendent of water works.

The word superintendent, in its ordinary acceptance, means, one who superintends, a director, an overseer; and in the absence of an undertaking defining, fixing, and enlarging his duties, his duties must be taken to be such, and such only, as the ordinary acceptance of the word would imply. There is nothing in the word superintendent, in the common use of it, which implies that he shall be a collector of moneys, much less a financial agent for the settlement of accounts and the handling of the revenues of a city or town. *City of Lafayette v. James*, *supra*.

The sureties upon the bonds in this cause promise to answer for the default of the principal, Elkana Craycraft, as *superintendent* of the water works, in the ordinary meaning of the word, *unless*, as appellant contends, the words, "according to law and contract," create a different liability.

The allegations of the complaint do not, nor could they increase or change the obligations assumed by the appellees upon the bonds in suit. *Dunlap v. Eden*, 15 Ind. App. 575.

There is no general condition in the bonds, that Craycraft shall in all things fully keep and perform the contract between himself and appellant; there is no provision therein of similar import; neither the fact of the existence of a contract between Craycraft and the appellant, the date of entering into such contract, nor any one, or part, or all of the obligations contained therein are in any way mentioned or referred to in the bonds executed by appellees. The bonds, we think, appear complete and perfect upon their face, and in the absence of mistake a new condition cannot be added. *Dunlap v. Eden*, *supra*.

We are further of the opinion that where duties are imposed upon a principal in a bond, not official, which are not commonly attached to the position which he is filling, and no mention of such unusual and different duties is made in the conditions of such bond, that the sureties upon such bond can only be held for the default of the principal, in the performance of such duties as are plainly and commonly understood to belong to the class of employment by which the principal is designated.

It is well settled that sureties are favorites of the law, and are not bound beyond the strict terms of the engagement, and their liability cannot be extended by implication beyond the strict terms of the contract. *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Dunlap v. Eden*, *supra*; *Post, Admr., v. Losey*, 111 Ind. 74.

The court in the last mentioned case says: "A surety is bound only by the strict terms of his engagement. He assumes the burdens of a contract without sharing its benefits. He has a right to prescribe the exact

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terms upon which he will enter into the obligation, and insist upon his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, *non haec in foedera veni*—this is not my contract.”

In the absence of any resolution of the trustees of the town of Salem, and in the absence of any ordinance fixing the duties of said Craycraft, which resolution or ordinance would have been open to the public, and in the absence of any condition in the bonds, declared upon in this action, extending said Craycraft's authority to the collection and accounting for the water rents, and in the absence of any statement in said bond mentioning or identifying any additional obligation imposed upon said Craycraft by contract with appellant, or that any contract between Craycraft and appellant in fact existed, we are of the opinion that the lower court did not err in sustaining the demurrers to each paragraph of the complaint.

Judgment affirmed.

STATE, EX REL. WRIGHT, ADMINISTRATOR, *v.*
TOMLINSON ET AL.

[No. 2,065. Filed January 28, 1897.]

EXECUTORS AND ADMINISTRATORS.—*Special Administrator.—Statute Construed.*—A special administrator has no authority to enter into an agreed statement of facts with another person concerning the assets of the estate, and pay over money to such person upon an order of court made thereon, under section 2891, Burns' R. S. 1894 (2237, R. S. 1881), declaring the powers of such special administrator to be “to collect and preserve the property of the testator or intestate until demanded by an administrator duly authorized to administer the same, when such special letters shall be deemed revoked.” *pp.* 667, 668,

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PLEADING.—*Answer.*—A paragraph of answer which is pleaded in bar of the entire action is bad where it does not answer the entire complaint. *p.* 668.

APPEAL AND ERROR.—*Overruling Demurrer.*—*Harmless Error.*—The overruling of a demurrer to a paragraph of answer by a special administrator, which fails to deny an allegation of the complaint that such administrator neglected and refused to receive certain assets of the estate which came to his knowledge, and suffered same to be converted by others, is harmless where it is found by the court that the decedent left no assets in the State. *p.* 674.

INSURANCE.—*Assignment of Life Insurance Policy by Parol.*—A parol assignment of a life insurance policy, payable to the estate of the assured, made by the assured to his wife, is valid, where the policy does not declare an assignment without the consent of the company void. *p.* 675.

SAME.—*Equitable Assignment of Life Insurance Policy.*—An equitable assignment of a life insurance policy payable to the estate of the assured is effected where the insured instructed the general agent of the company, by letter, to have such policy made payable to his wife, although the change is not made until after his death. *pp.* 675, 676.

SAME.—*Assignment of Life Insurance Policy to Wife.*—An assignment of a life insurance policy, which was payable to the estate of insured, by the insured to his wife, is valid as against his creditors, except as to the amount of the premiums paid thereon, where it was taken out only two years before the transfer thereof, and the death of the insured. *pp.* 677, 678.

From the Montgomery Circuit Court. *Affirmed.*

M. E. Clodfelter, Claude L. Thompson, George D. Hurley and Frank W. Hurley, for appellant.

G. W. Paul and H. D. Van Cleave, for appellees.

COMSTOCK, C. J.—The complaint in this case is upon the bond of a special administrator; George N. Tomlinson, and his sureties, Wm. Tomlinson and David Hartman.

The complaint is in two paragraphs. A copy of the bond is filed with each paragraph.

The breaches of the bond assigned are that Tomlinson, special administrator, received the sum of \$1,971.88 which he converted to his own use and the use of others.

Second—That said special administrator failed to preserve the property of the estate which came into his hands.

Third—That said special administrator had knowledge of a large amount of personal property belonging to the estate, and failed and refused to preserve the same for the use of the estate.

Fourth—That \$2,000.00 came into the hands of said special administrator which he wasted and wrongfully turned over to others, whereby the same was lost to the estate.

The breaches of the bond assigned in the second paragraph of complaint are in effect the same as those assigned in the first.

The appellee, G. N. Tomlinson, filed his separate answer in three paragraphs. The first is a general denial. The second alleges, in substance, that in March, 1894, he was duly appointed and qualified as special administrator of the estate of Austin L. Tomlinson, late of Montgomery county, Indiana, deceased, with bondsmen, as set out in the complaint; that after his appointment there came into his hands the sum of \$1,971.85 from a certain insurance policy upon the life of his decedent; that Edith Tomlinson, the widow, claimed the money as her own, and demanded the same of him; that she had been substituted as beneficiary in said insurance policy, and threatened to bring suit against this defendant (appellee) for the recovery of the same; and that being unwilling to pay her said money without an order of court, he and the said Edith Tomlinson, by agreement, in good faith, on an agreed statement of facts submitted the question of ownership of said money to the circuit court of Montgomery county, Indiana, and thereupon the court found and adjudged that said money belonged to said Edith, and rendered judgment in her favor,

and against appellee, and ordered appellee to pay said money to her, and that afterwards, upon the faith of said order, appellee, acting as such trustee, paid to the said Edith the sum of \$1,471.88 being the full amount of said money after deducting \$500.00 therefrom, which he had paid for funeral expenses of decedent on the order of court, with the consent of said Edith; that he paid said balance to the said Edith on the 12th day of April, 1894, and on the 16th day of April, 1894, he filed in said circuit court his report in final settlement of his said trust, showing his compliance with the order of the court; which said report the court approved, and discharged appellee and his sureties from all liability on the bond in suit, which order of approval and discharge were duly entered in the proper record of said circuit court; that this is the same money claimed by the relator and set out in his complaint.

The third paragraph alleges that the money mentioned in complaint did not belong to said estate, but did of right belong to Edith Tomlinson, widow aforesaid, and the administrator had no right to the same.

For first paragraph of reply to the second paragraph of the separate answer of appellee, George N. Tomlinson, appellant, alleges in substance that appellee's appointment as special administrator was procured by fraud and collusion between the special administrator and Edith Tomlinson for the purpose of defrauding the creditors of said decedent; and as a part of the scheme the agreed statement of facts was entered into and submitted to the court, and the order procured for the payment of money to the widow aforesaid.

The second paragraph of appellee's reply to second paragraph of answer admits the filing of the agreed statement of facts entered into by and between the

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special administrator and Edith Tomlinson, and that the court on said statement adjudged that the proceeds of said policy belonged to said widow, and ordered the payment of the same to her, but avers that the court had no jurisdiction to make such order upon said statement; that the estate was largely indebted, and the order procured for the purpose of defrauding the creditors of the estate, and that after the appointment of the general administrator, relator herein, and upon petition, to which Edith Tomlinson and George N. Tomlinson were made parties, procured the order of said court vacating said order; that the judgment setting aside the order made upon said agreed statement of facts was in full force and effect.

The fourth paragraph of reply to the third paragraph of answer of George N. Tomlinson alleges that George N. Tomlinson having procured himself to be appointed special administrator, having obtained the policy and presented it to the insurance company as special administrator, having surrendered it and received the money thereon, and deposited it in his name as special administrator, etc., he could not afterwards dispute the fact that it was his duty to receive the assets of the estate, preserve the same and turn them over to the regular administrator.

There was also a general denial.

Demurrers to the second and third paragraphs of answer were overruled. Demurrer to the fourth paragraph of reply was sustained and overruled as to the first and second. There was a trial had, and upon request of appellant the court made a special finding of facts, and stated its conclusions of law.

The first error assigned is overruling appellant's demurrer to second paragraph of separate answer of appellee, George N. Tomlinson. Appellee, by the facts averred in this paragraph, seeks to avoid liability on

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the ground that he, as special administrator, and Edith Tomlinson entered into an agreed statement of facts concerning the ownership of the proceeds of the insurance policy upon which the court ordered the special administrator to pay the money to her, and that after he had complied with the order of the court he made a report of said trust, and resigned therefrom, which report was approved, his resignation accepted and he discharged; that this is the money referred to in the complaint.

This paragraph, while addressed to the whole complaint does not answer that portion of it which avers that the special administrator "wholly neglected and refused to receive more than \$500.00 of the property and assets of said estate which came to his knowledge and suffered and permitted the same to be wrongfully taken by others and converted to their own use."

The complaint charges a neglect of duty as to money and other assets which he refused to receive. This allegation is not met by this allegation of answer. The demurrer therefore should have been sustained. *Farman v. Chamberlain*, 74 Ind. 82; *Dunn v. Barton*, 2 Ind. App. 444.

The demurrer should have been sustained for another reason. The powers of a special administrator are declared to be by statute "to collect and preserve the property of the testator or of the intestate until demanded by an executor or administrator duly authorized to administer the same when such special letters shall be deemed to be revoked." Section 2391, Burns' R. S. 1894 (2237, R. S. 1881). The question is passed upon in *Tomlinson v. Wright, Admr.*, 12 Ind. App. 292.

The court says in speaking of the special administrator, appellee in this case, and of the money realized from the insurance policy mentioned in the answer,

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that "all he [special administrator] was authorized to do with it was to hold and possess it until an administrator shall be appointed and then pay the same to him. He had no authority to allow, or to pay claims or to enter into an agreed case in relation to the money which he had collected as such special administrator." See, also, *Cole, Admr., v. Lafontaine*, 84 Ind. 446.

The third paragraph of the answer is addressed only to the averment of money in the complaint, alleging that it did not belong to the estate of Austin L. Tomlinson. It is pleaded in bar of the action and as it does not answer the entire complaint, the demurrer should have been sustained. *Farman v. Chamberlain, supra*.

The fourth assignment of error is the sustaining of the demurrer to the fourth paragraph of reply to the third paragraph of answer of appellee.

It is pleaded as an estoppel, but as we have held that paragraph of answer insufficient, it is not necessary to discuss this ruling.

The court in the special finding of facts found that Austin L. Tomlinson was, on the 1st day of March, 1894, and for a long time prior thereto had been a resident of Montgomery county, Indiana, and that on said date while temporarily sojourning at Fullerton, California, he died intestate; that on the 3d day of March, 1894, George N. Tomlinson was, by the clerk of the circuit court of Montgomery county, in vacation, appointed special administrator of the estate of said deceased and executed his bond with his co-defendants in this action, William Tomlinson and David Hartman as his sureties, which is the bond sued on in this action; which bond was duly approved, and he immediately thereafter qualified and entered upon the discharge of his duties as such special administrator; that on the 26th day of January, 1892, the said

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Austin L. Tomlinson, then an unmarried man, obtained a policy from the Equitable Life Assurance Society of the United States, a corporation organized under the laws of the state of New York, with its home office in New York City, insuring his life in the sum of \$2,000.00, made payable to his estate, which policy was in force at the date of his death; that the mode provided by said society for assigning policies or changing the beneficiary, required the holder of the policy desiring the transfer or change, to make out an application to the company giving the number and date of policy and full name of beneficiary, which application should be accompanied by one dollar to pay for issuing a new policy; that no such application was ever made, and that no new policy was issued; but that such mode was not stated in or on the policy; that on the 15th day of February, 1893, the said Austin L. Tomlinson married one Edith Guthrie, who continued to be and was his wife at the time of his death, and he had one child by her still living; that on the 4th day of January, 1894, said Austin L. Tomlinson was the owner and in possession of a stock of groceries in Crawfordsville, Indiana, of the value of \$800.00; that he had been engaged in the grocery business for more than two years prior to that date; that he had notes and obligations owing him, the proceeds of said business, amounting to more than \$3,000.00; that he was indebted to divers persons, firms and corporations for goods purchased in carrying on said business, the sum of \$4,000.00; that all of said groceries, notes and obligations were in his life time applied to the payment of said indebtedness, and no part of the same came into the hands of said special administrator; and that on the date of his death said Austin L. Tomlinson had no rights, credits, property or choses in action in the State of Indiana, except said

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policy of insurance; that immediately after his appointment, said special administrator demanded and received of said Equitable Life Insurance Company payment of said policy the sum of \$1,971.88, and gave his receipt therefor as special administrator; that he paid out for funeral and burial expenses of said Austin L. Tomlinson, and court costs \$500.00, taking receipts therefor as special administrator. That on the forenoon of his death the deceased caused to be prepared, signed, acknowledged, and caused to be mailed to the general agents of said Equity Life Assurance Company, at Indianapolis, the following instructions:

“FULLERTON, CAL., March 1, 1894.

To RICHARDSON & MCCREA,

Gen. Agents Eq. Life Assurance Co. of N. Y.

Indianapolis, Indiana.

Gentlemen: Please have life insurance policy taken out by me (A. L. Tomlinson) in 1892 for the amount of two thousand dollars, and made payable to my estate, transferred, and instead have the amount of said policy made payable to my wife, E. L. Tomlinson.

[Signed] A. L. TOMLINSON.”

That he executed the foregoing instrument for the purpose of having said policy transferred and made payable to his wife; that before deceased left his home for California he expressed his intention of giving said policy to his wife, and after her arrival at Fullerton he informed her that he had done so; that the agents of said Equity Assurance Company received said letter after the death of said Austin L. Tomlinson, and answered the same on the 6th of March, 1894, giving instructions as to the manner in which he should make out the application for change of beneficiary in his policy. The court further found that between the 10th day of March, 1894, and the 1st day of April, 1894, said letter of the insurance com-

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pany came into the possession of said Edith Tomlinson, and she and the said George N. Tomlinson placed the same in the hands of Paul & Bruner, attorneys of the said special administrator, and said attorneys, after having advised with the said widow and special administrator, prepared an agreed statement of facts which was signed and verified by the said widow and special administrator; said agreed statement of facts recites the fact of said Austin L. Tomlinson having taken out the insurance policy heretofore referred to, in favor of his estate, his subsequent marriage to said Edith, the birth of the child, the failure of the health of the said Austin, his trip to California for the benefit of his health, his letter to the insurance company requesting the change of beneficiary, the answer of the assurance company to said request; that he did not have said insurance policy; that it was at his home in Crawfordsville in the possession of his wife; that his wife had not accompanied him to California; that several days before he died he had expressed his desire and intention of transferring said policy to his wife, but was persuaded to wait until her arrival; that she not arriving, and fearing to wait longer, he made the assignment, thinking it sufficient to transfer all rights in the same to her; that George N. Tomlinson was appointed administrator, and was ignorant that said policy had been transferred; that deceased left no estate unless the policy belonged to the estate, that relying on the fact that said policy belonged to the estate he had advanced expenses of last sickness and funeral expenses of deceased in the sum of \$500; that on the 2d day of April, 1894, said assurance company paid the amount due on the policy, \$1,971.88 to the special administrator, which amount is claimed by said widow, and asking the court to determine to whom said money belonged and to make such order as

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the court deemed to be right. That said attorneys, Paul & Bruner, on the 12th day of April, 1894, presented the said agreed statement of facts to the judge of the circuit court of Montgomery county in chambers; that the same was filed and docketed in said court, and on said day, upon said agreed statement of facts, said court ordered and decreed that the proceeds of said policy, \$1,971.88, belonged to said Edith Tomlinson and entered judgment in favor of said Edith and against said special administrator. The court further finds, that in pursuance of said order, said special administrator paid to said Edith Tomlinson the proceeds of said policy, after deducting \$500.00 expended as aforesaid, viz: \$1,471.88, which sum she receipted to him for, as special administrator; that on the 16th day of April without any notice to the heirs or creditors, said special administrator presented to the court his final settlement report showing the receipts and expenditures as hereinbefore stated, and the payment to said Edith Tomlinson the sum aforesaid, and that he had no other property or assets in his hands as special administrator; that he asked that his report be approved, and that he be discharged as special administrator, and the court made an order approving said report and discharging said special administrator; that said Paul & Bruner received from the said Edith Tomlinson for services rendered as attorneys in the matter of said estate and the procurement of said settlement one hundred dollars out of said insurance.

That on the 2d day of May, 1894, Charles W. Wright, relator, the duly appointed and qualified regular administrator of said estate, filed his petition in said court alleging, among other things, that said agreed statement of facts was procured, and the order and decree entered thereupon, were obtained by fraud prac-

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ticed upon the court by the said George N. Tomlinson as special administrator, and that the court had no jurisdiction of the subject-matter to make such order upon such statement of facts; that said special administrator had no authority to make such statement of facts with said Edith Tomlinson; that said order was fraudulent and void, and that the same should be set aside and vacated. That on the 25th day of May, 1894, the court sustained said petition and entered a judgment setting aside and vacating said order and decree and all orders and decrees made under the same. The court further finds that all orders and decrees under said order and judgment were by said court upon said petition set aside and vacated, the court stating as a reason that it had no jurisdiction to make the same. That the said special administrator and said Edith Tomlinson were parties defendant to said petition, and appeared thereto by their attorneys, Paul & Bruner, and filed answers to said petition and resisted the vacation of said judgment so made upon said agreed statement of facts; that afterwards the said George N. Tomlinson and said Edith Tomlinson appealed to the Appellate Court of the State of Indiana from said judgment vacating the order and judgment upon said agreed statement of facts; that the judgment so appealed from was afterwards by said Appellate Court affirmed.

That claims have been filed against the estate of A. L. Tomlinson and allowed to the amount of \$1,400.00, which remain wholly unpaid; that said George N. Tomlinson had knowledge of such indebtedness when he made said agreed statement of facts and at the time he paid said money to said widow; that in connection with the order vacating the judgment on the agreed statement of facts, the court made the follow-

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ing order: "And it is further ordered by the court that the further proceedings in the cause No. 2418 probate docket, that the plaintiff, W. Wright (relator), present administrator * * * be substituted for George N. Tomlinson, formerly special administrator, and that George N. Tomlinson and Edith Tomlinson be made defendants, and that said administrator frame and tender issue to defendants that will determine the ownership of a certain insurance policy mentioned in the agreed statement of facts made on record in a former hearing of this cause, and also determine the right to the proceeds of said policy, and the said Wright is ordered to institute proceedings as above indicated and prosecute the same to a speedy and proper conclusion." And the court finds that relator did not obey said order.

As a conclusion of law the court stated that the plaintiff had no right of recovery.

The court having found as facts that the decedent left no assets in the State of Indiana at his death to the possession of which a special administrator would have been entitled, unless said insurance policy belonged to his estate, and that the order made and entered upon the agreed statement of facts had been vacated and set aside. We cannot see that the appellant was harmed by the ruling of the court upon the demurrer to the second paragraph of appellee, George N. Tomlinson's answer.

The Appellate Court, in *Tomlinson v. Wright, Admr., supra*, in affirming the judgment vacating the order made upon the agreed statement of facts, was careful to say that the merits of the controversy were not before it and that the only question it deemed necessary to consider was whether the special administrator possessed such power as authorized him to enter into such an agreement with the widow of decedent, ad-

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ding, "It is true as a matter of course if the appellant, Edith Tomlinson, was the equitable owner of the policy of insurance, then the administrator, whether special or general, had no right thereto, nor to the proceeds thereof as against her. If, on investigation by the court having jurisdiction of the parties and of the subject-matter of the controversy, it is found that said Edith was, at the death of her husband, entitled to the money, the appellee will not be entitled to recover against appellants or either of them.

The court makes no finding that the relator was entitled to the proceeds of said policy, nor is there any finding of fraud on the part of the special administrator or said Edith Tomlinson. The burden was upon the relator (appellant) upon both of these averments of the complaint.

A life insurance policy is a chose in action and may be assigned. Appellant contends that the common law will be presumed to be in force in California when the insured directed the change of beneficiary in the policy, and that, under the common law, choses in action are not assignable. Admitting that under the common law the policy could not be assigned so as to pass the legal title to the instrument, or the money, yet a transfer would be regarded as an equitable assignment and enforced in equity. *Pomeroy v. The Manhattan Life Ins. Co.*, 40 Ill. 398.

When the policy does not declare an assignment without the consent of the company void, a parol assignment is valid. *O'Brien v. Prescott Ins. Co.*, 11 N. Y. Supp. 125.

Knowledge of the assignment of a life insurance policy is important to the insurer to prevent the possibility of its being compelled to pay both the assignee and the legal representatives of the insured.

In fire insurance policies there is generally a con-

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dition that any assignment will be void, without the assent of the insurer be first obtained. The reason is obvious,—a company may be willing to issue a policy to one person and not another. *Robinson v. Cator*, 78 Md. 72, 26 Atl. 959.

A life insurance policy may be transferred by delivery without writing. *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625.

A husband may orally assign a policy of insurance on his own life to his wife. *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1.

In *Grand Lodge, etc., v. Child*, 70 Mich. 163, 38 N. W. 1, in which case the certificate of membership made the betrothed of the insured, beneficiary, he retaining the certificate in his possession. She married another, and the certificate having been lost he made a statement of the loss and applied for a reissue of the certificate to his son as beneficiary, and the application was refused; the rules of the organization required the change to be endorsed on the original certificate. By the advice of the officers of the organization he attempted to make the change of beneficiary by giving power of attorney to collect the amount which should accrue under the certificate. The court held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund.

The general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to exceptions, and one is that, if it be beyond the power of the insured to comply literally with the regulation, a court of equity will treat the change as having been legally made. *Supreme Conclave v. Cappella*, 41 Fed. 1.

In short, subject to the claims of creditors to avoid

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a transfer made in fraud of their rights, any act which indicates an intention to transfer the interest in the policy, whether voluntarily or for a consideration, will be held good. Bliss on Insurance, section 331.

• From the findings of the court there can be no question as to the intention of the insured to transfer to his wife his rights in the policy under consideration; and in the light of the authorities cited, and many others to the same effect there can be no doubt that an assignment in equity was made valid as to every one, unless the creditors of the assured are to be excepted.

Can this equitable assignment made by an insolvent debtor be upheld against the creditors?

It is the duty of the husband and father to provide reasonably for his dependent family. The law favors the making of reasonable provision by a man for his dependent family, and in *Johnson v. Alexander*, 125 Ind. 575, 9 L. R. A. 660, the Supreme Court of Indiana has said: "It is not a violation of the statute, and in fraud of creditors for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family."

In *Pence v. Makepeace*, 65 Ind. 345, it is held that only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent debtor on a policy of insurance on his life for the benefit of his wife and children be revoked by his creditors, and in no event can any excess over the amount of the premium so paid be recovered.

To the same effect is *Washington Central Bank v. Hume*, 128 U. S. 195. In 2 Bigelow Frauds, p. 129, it is said, "a debtor though insolvent may use his earnings to pay for insurance on his life, in favor of his family."

In *McCutcheon's Appeal*, 99 Pa. St. 133, it is held that when a person takes out a policy of insurance

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upon his own life and subsequently assigns the same to his wife, child, or other dependent relative, the mere fact that the assignor in such case is insolvent at the time of making the assignment, does not warrant the inference that the assignment was in fraud of creditors.

Authorities in the same line, to the same effect, might be multiplied, but it is not necessary. There is nothing in the findings of the court to show bad faith; on the contrary, they show a commendable desire on the part of the husband to make some provision for his wife and child. The policy was taken out in January, 1892, and transferred March 1st, 1894, at which date the insured died. At most his creditors are injured if the transfer is upheld by the amount of premium paid for two years. The amount might have been ascertained in the proceedings which appellant was ordered by the court below to institute, to determine the ownership of the insurance policy in question, which order of court he failed to obey. In our opinion the transfer of the policy was valid and not in fraud of creditors. Upon the effect of the setting aside of the order made on the agreed statement of facts to pay the widow the balance of the proceeds of the insurance policy, after the special administrator had paid to the widow under said order said balance, we deem it only necessary to say that trustees, acting under orders of the court having jurisdiction of the subject-matter, will be protected thereby. If by reason of such order or decree money is paid to one not entitled thereto, the protection afforded to the trustee is not extended to the person so paid. In such cases the party really entitled to the money, if not a party to the previous suit and bound by the decree, may have suit against the person to whom the money is paid.

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We find no error for which the judgment of the court below should be reversed.

Judgment affirmed.

MORRIS v. ELLIS.

[No. 2,017. Filed January 29, 1897.]

CHATTEL MORTGAGE.—*Invalid if not Recorded in the County Where the Mortgagors Reside.*—A chattel mortgage is void as against an assignee for creditors unless it is recorded in the county in which the mortgagors reside, under section 6638, Burns' R. S. 1894, which provides that "No assignment of goods by way of mortgage, shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof." pp. 682-686.

PLEADING.—*Complaint.*—*Allegation of Record of Chattel Mortgage in County Where Mortgagor Resides.*—An allegation in a complaint that a chattel mortgage was recorded in the county where the mortgagors were engaged in a general mercantile business is not equivalent to an allegation that the mortgage was recorded in the county in which the mortgagors reside as required by section 6638, Burns' R. S. 1894. p. 686.

SAME.—*Complaint.*—*Construction of Language Employed in a Pleading.*—It is the duty of the court in construing a pleading and determining its sufficiency to give the language employed a reasonable intendment, but when the words used in a complaint wholly fail to state a material fact essential to a recovery it must be resolved against the pleader. pp. 686, 687.

From the Greene Circuit Court. *Affirmed.*

C. E. Davis and W. V. Moffett, for appellant.

Emerson Short, for appellee.

WILEY, J.—The only question presented in this case is the sufficiency of the complaint.

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Appellant sued appellee for conversion, and based his action upon the following material facts, as averred in his complaint, to-wit: That on — day of —, 1894, Willard M. Hash and James B. Foster were partners as general retail merchants, in Linton, Greene county, Indiana, and owned a large stock of general merchandise; that on said day they executed to appellant "a mortgage, to secure the payment of two notes owing from them to appellant, amounting in the aggregate to thirty-five hundred dollars, which said mortgage, in less than ten days from the said date of its said execution, was duly recorded in the recorder's office of Greene county in the chattel mortgage record thereof;" that soon thereafter the said Hash and Foster made a voluntary assignment to the appellee, for the benefit of all their creditors, of said stock of goods and merchandise, which assignment was made subsequent to said mortgage, and of which mortgage the appellee had notice at the time said assignment was made; that said deed of assignment was duly executed and recorded according to law; that said appellee qualified and took possession of said stock of goods, and that the same at the time was worth four thousand dollars; that soon thereafter the appellee, as such assignee, applied to, and obtained an order from the Greene Circuit Court, authorizing him to continue the business of retailing said stock, and to buy additional stock and sell the same, in the ordinary course of business; that appellant was not a party thereto and had no notice thereof; that pursuant to said order, and without the consent of appellant, appellee proceeded to sell at retail, the stock of goods aforesaid, and thereupon, appellant brought his action to foreclose said mortgage, to which proceeding the appellee was made a party; that default was taken against Hash and

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Foster, the mortgagors, and that such further proceedings were had, as that on December 21, 1894, appellant obtained judgment and decree of foreclosure. That an order of sale was issued upon said decree, and the portion of said stock of goods, then remaining in the possession of said appellee, as such assignee, was sold at sheriff's sale, and purchased by appellant for the sum of twenty-six hundred dollars, which amount was credited on said judgment, leaving still due thereon the sum of one thousand dollars. That after said assignment, and during the pendency of said proceedings to foreclose said mortgage, the appellee, as such assignee, and without the consent of appellant, sold at retail out of said original stock, goods of the value of fifteen hundred dollars, and delivered the same to the various retail purchasers; that he also sold all the goods so purchased by him under the order of said court, leaving in said store, goods of the value of twenty-six hundred dollars and no more. That though appellant demanded and requested, the appellee refused and still refuses to apply the money, or any part of it, so obtained from the sale of said goods, to the payment of said mortgage; but without appellant's consent, has expended a large portion of said money for attorney's fees, costs, investments, and other expenses of said trust, and has retained the remainder of said money as compensation for his services, and in the manner above set out has converted the same to his own use, and has diverted the same from the payment of said mortgage, by delivering the goods so sold to divers purchasers, who consumed the same; that by reason thereof appellant has been unable to find or obtain said goods or any part thereof, to his damage, etc.

To this complaint, the court below sustained a demurrer, to which ruling an exception was reserved,

and the action of the court in sustaining said demurrer is the only error assigned here. The complaint proceeds upon the theory that the appellee is liable to appellant to the extent of the value of the goods sold by appellee, as assignee, under and by virtue of the order of the Greene Circuit Court.

Appellant announces and discusses three propositions to-wit:

1. That if the mortgagor of chattels sells them and puts them beyond the reach of his mortgagee, he is liable for conversion.

2. If the transferee of the mortgagor sells the goods and puts them beyond the reach of the mortgagee, he is liable for conversion, if he had notice of the mortgage.

3. If a sheriff or constable sells mortgaged goods on an execution, to which the mortgagee was not a party, and without consent of the mortgagee should deliver possession to the purchaser before payment of the mortgage, he would be liable for conversion.

We do not think these propositions are the subject of legitimate discussion, in view of the allegations of the complaint.

Under the well settled rule in this State, statutory liens can only be acquired by a strict compliance with the particular statute creating them, and there must be an affirmative showing of such compliance.

The statute relating to chattel mortgages, which is applicable to the question now under consideration, is section 6638, Burns' R. S. 1894 (4913, Horner's R. S. 1896), and is as follows: "No assignment of goods, by way of mortgage, shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of

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conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof."

In the case of *Granger v. Adams*, 90 Ind. 87, Elliott, J., speaking for the court says:

"It is settled that a mortgage of goods, where possession is retained by the mortgagor, is not valid as against creditors unless executed and recorded in strict accordance with the statute. The common law did not recognize the validity of such instruments against creditors, and the cases are well agreed that one who asserts a right under such an instrument paramount to the claims of creditors, must show that all has been done that the statute requires. At common law, possession was essential to the validity of the mortgage as against creditors of the mortgagors. Registration is made by law the substitute for possession, and, in order that registration shall have this effect, it must be such as the statute prescribes." Continuing, Elliott, J., says: "The fact that the mortgage is executed by a partnership composed of several members does not change the rule. All the partners are mortgagors, and, as the firm can have no place of residence, the residence of the mortgagors must be that of the individuals composing the partnership. In ordinary legal proceedings, the partnership is reached through the individual partners. * * * It seems clear upon principle that a mortgage of goods executed by a partnership must be recorded in the counties where the partners reside, and so the authorities declare. *Stewart v. Platt*, 101 U. S. 731; *Kane v. Rice*, 10 N. B. R. 469; *DeCoursey v. Collins*, 21 N. J. Eq. 357; *Herman Chat. Mort.*, p. 162; *Jones Chat. Mort.*, section 257."

The case of *Brown v. Corbin*, 121 Ind. 455, is directly

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in point, and is clearly decisive of the question under discussion.

In that case a mortgage was executed by Augustus Palin and Nancy J. Palin, his wife, on certain real estate, and on the undivided one-half of a building situate on certain lots in Williamsport, Warren county, Indiana, which said building had been erected by permission of the owner of the real estate, under a contract that it should be removed on notice. The appellant was made a party defendant on the ground, as alleged in the complaint, that she had purchased the building after the execution of the mortgage, and also the real estate upon which it stood. The complaint was accompanied by a copy of the mortgage, as an exhibit. The mortgage was in the usual form of a mortgage on real estate, reciting the fact that "Augustus Palin and Nancy J. Palin, his wife, of Warren county, in the State of Indiana, mortgage and warrant to Amos Martin, of Warren county, in the State of Indiana," etc. The mortgage was duly acknowledged, and recorded in the recorder's office, on the day of its execution, and was duly assigned to the appellees. There was no direct averment in the complaint that it was recorded within ten days in the recorder's office of the county where the mortgagors resided. As appellant did not have actual knowledge of the mortgage, she contended that it must affirmatively appear in the complaint, or the evidence, that the mortgage was recorded according to the provisions of section 6638 (4913), *supra*. As to this objection, Olds, J., speaking for the court says: "It is sufficient to say that it appears upon the face of the mortgage that both the mortgagors and mortgagees reside in Warren county, and the evidence shows it to have been recorded in the recorder's office of said county the same day of its execution. The mortgage showing

upon its face that the mortgagors resided in Warren county, the mortgage would be, *prima facie*, a valid lien, and the burden of proof would rest on the person asserting its invalidity to show that it was not recorded in the county where the mortgagors resided."

The weight of the authorities is, that a chattel mortgage, under statutes like, or similar to ours, if not executed and recorded in strict compliance with the provisions of the statute, is void as to creditors, or third persons, having an interest in the property, even where they have actual notice of the irregularity. *Lockwood v. Slevin*, 26 Ind. 124; *Martin-Perrin, etc., Co. v. Perkins*, 63 Mo. App. 310; *Scarry v. Bennett*, 2 Ind. App. 167.

The case of *State, ex rel., v. Griffin, ante*, 555, is in point here. That case was an action on a constable's bond to recover damages for selling mortgaged chattels upon an execution. The case was tried by a jury, and a special verdict returned. The complaint, among other things, averred that the mortgage was recorded in Cass county, Indiana, on the day of its execution. In the special verdict, after finding that the mortgage described in the complaint was executed, a verbatim copy of it is set out, in which it was recited: "Know all men by these presents, that August Held and Edward P. Rank, of Cass county, in the State of Indiana, have bargained and sold, and do hereby bargain and sell, unto Ferdinand Krebs, of Cass county, Indiana," etc.

The jury failed to find and state as an ultimate fact that the mortgage was recorded within ten days, in the county where mortgagors resided, and for that reason the special verdict was held to be infirm and would not support a judgment in favor of the mortgagee.

Comstock, C. J., speaking for the court said: "The

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finding of the jury that the mortgagors were residents of the county in which the mortgage was recorded was essential to make the mortgage valid against appellees. If they make no finding upon this question, it is equivalent to a finding that they were not residents of said county. * * * If the fact of residence is found, it appears only in the recital of the mortgage, which the jury set out in their finding, and heretofore given. The statement in the mortgage of the residence of the mortgagors, while evidence of the fact, is not the inferential fact to be found. The jury found evidence of a fact, but not the fact itself."

Tested by the statute, and the authorities above cited, is the complaint in the case at bar sufficient to withstand the assault of the demurrer? Recurring again to the averments of the complaint, we find that it is charged that Hash and Foster were engaged in a general mercantile business at Linton, Greene county, Indiana; that they executed a mortgage to appellant, embracing their stock of goods, and that said mortgage was recorded, within ten days, in the recorder's office of said county. It is not alleged in the complaint, that Hash and Foster were residents of Greene county. The fact that they were doing business in said county, as averred, cannot be tortured into saying they were residents thereof. A person may engage in business in Indianapolis and reside in Anderson. The history of the times, and the knowledge of current events, inform us, that it is no unusual custom for persons to engage in business in one place, and maintain their residence in another place, far distant therefrom.

In determining the sufficiency of pleadings, courts are guided by the facts averred. *Ades v. Levi*, 137 Ind. 506.

While it is the duty of the court, in construing a

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pleading and determining its sufficiency, to give to the language employed, a reasonable intendment, yet when the words used in a complaint wholly fail to state a material fact essential to a recovery, it must be resolved against the pleader. The appellee, in the case at bar, was an assignee, under an assignment, which the complaint avers was in all things according to law. As such assignee he was a representative of all the creditors of his assignors, and if the mortgage upon which appellant based his right of action was not recorded in the county where the mortgagors resided, although the appellee had actual knowledge of the mortgage as charged, it would be invalid and void as to him and the creditors of his assignors.

The complaint failing to aver that the mortgage was recorded in the county where the mortgagors resided, and also failing to aver any other facts from which it might be reasonably inferred that it was so recorded, we are led to the conclusion that the complaint is wholly insufficient, and that the court below did not err in sustaining the demurrer.

Judgment affirmed.

BLACK, J., not present.

THE TOWN OF SALEM v. WALKER.

[No. 2020. Filed February 2, 1897.]

DAMAGES.—Personal Injuries.—Burden of Proof.—Contributory Negligence.—In an action for damages for personal injuries, the plaintiff must allege and prove his freedom from contributory negligence. p. 689.

MUNICIPAL CORPORATIONS.—Streets Must be Kept in Reasonably Safe Condition.—It is the duty of a city or town to keep its streets in a reasonably safe condition for travel. p. 691.

SAME.—Failure to Keep Street in Safe Condition.—Duty of Traveler.—The failure of a town to keep its streets in a reasonably safe condition will not excuse the traveler from the use of ordinary care. p. 691.

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SAME.—Rights of Traveler Who has Knowledge of Defect in Street.—

One who has knowledge that a street in a city is out of repair, is not, therefore, bound to forego travel thereon; but the care on the part of the traveler in such case must be in proportion to the danger that might be encountered by reason of the defect or obstruction. *p. 691.*

NEGLIGENCE.—When a Question of Law.—Facts Undisputed.—In an action for damages for personal injuries, where the facts as to the manner in which the injury occurred are undisputed, it is the province of the court to determine whether or not the facts amount to negligence. *p. 693.*

CONTRIBUTORY NEGLIGENCE.—Horseman in Use of Street.—A horseman who is apprised of an obstruction in a street at which his horse took fright and turned back, and voluntarily rides the horse a second time to the place of obstruction and is thereby thrown from his horse and injured, is guilty of contributory negligence so as to preclude a recovery in an action against the municipality. *p. 693.*

From the Washington Circuit Court. *Reversed.*

Samuel C. Mitchell and *Robert B. Mitchell*, for appellant.

John A. Zaring and *Milton B. Hottel*, for appellee.

ROBINSON, J.—The appellee sued the appellant to recover damages for an injury received by being thrown from his horse, which became frightened at certain obstructions in a road or street within the corporate limits of the town of Salem. The complaint was in two paragraphs. Demurrers for want of facts overruled and exceptions taken. A trial of the issues formed resulted in a verdict for the appellee, upon which the court rendered judgment over appellant's motion for a new trial.

Appellant has assigned as error the overruling of its demurrer to the complaint and its motion for a new trial. Among the reasons assigned in the motion for a new trial are that the verdict is contrary to the law and the evidence and is not sustained by sufficient evidence.

It is insisted by appellant that the evidence fails to

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show that the appellee was himself free from negligence, but that the evidence shows that he was guilty of negligence which contributed to his injury.

It is well settled that in an action of this kind contributory negligence on the part of the plaintiff is not a matter that the defendant must establish, but that the plaintiff must allege in his complaint and prove that the injury was incurred without his own negligence having contributed thereto. The burden is on him to show not only the negligence of the defendant, but also his own freedom from any negligence contributing to the injury. His failure to establish either will defeat a recovery.

The evidence shows that at the time of the injury there was, on a certain street or road, within the corporate limits of the town, an accumulation of rubbish consisting in part of brickbats, boxes and barrels; that in the heap had also been thrown some fish which at that time gave off a very offensive odor. This rubbish was close to the traveled part of the street or road on which the injury occurred. On the day of the alleged injury, the appellee, a young man about twenty-five years old, was riding alone, on horseback, into the town of Salem, on the road or street above mentioned. The horse he was riding was three years old, and gentle. As to how the injury complained of occurred, the appellee testified, at the trial, on direct examination as follows:

“Q. Go on and tell what your horse did.

A. I was coming along on the old grade road, and came near this obstruction and my horse took fright, refused to pass it, and turned round. I stopped him and rode him up to the place where he first frightened, and he snorted and reared, and fell back on me.

Q. What was there in the road that you know your horse took fright at?

A. Well, there were several things in the road.—barrels, tin cans, buckets of fish, and all kinds of rubbish.

Q. Do you know which ones, or whether it was all that your horse took fright at?

A. There were three barrels in front of the horse and some fish, and I couldn't tell exactly which he got scared at.

Q. Was there any scent there at the time that your horse took fright? Answer. Yes, sir."

And on cross-examination the appellee testified.

"Q. Now, how close were you to the barrels when your horse got scared first?

A. I must have been within fifteen or twenty feet, don't know exactly.

Q. What did your horse do when it first got scared?

A. It wheeled around with me and run back ten or fifteen feet.

Q. When your horse first scared there, did you see these barrels?

A. Yes, sir, couldn't help but to see them.

Q. Then what did you do?

A. Turned him around and rode him up to the place again.

Q. Did you have anything to urge him?

A. Had nothing except the bridle reins, might probably have hit him with that.

Q. What is your impression as to whether you did or didn't?

A. I think probably I hit him with the bridle rein a little.

Q. When he first wheeled around and started to run back you saw the barrels and say that is what he got scared at?

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A. I suppose he got scared at them or the fish.

Q. After he run back fifteen or twenty feet and after he had already scared at the barrels you urged him up to the barrels again? A. Yes, sir.

Q. And then it was that he reared, and fell back on you, you say? A. Yes, sir."

It is the law that it is the duty of a city or town to keep the streets and sidewalks thereof in a reasonably safe condition for travel. *Michigan City v. Bocckling*, 122 Ind. 39; *Michigan City v. Ballance*, 123 Ind. 334; *Glantz v. City of South Bend*, 106 Ind. 305; *City of Columbus v. Strassner*, 124 Ind. 482; *City of Goshen v. England*, 119 Ind. 368; *Town of Albion v. Hetrick*, 90 Ind. 545.

But even if the municipality has neglected to keep its streets in a reasonably safe condition, the appellee is not excused from the exercise of ordinary care for his own safety. *Mount Vernon v. Dusouchett*, 2 Ind. 586; *Riest v. City of Goshen*, 42 Ind. 339; *Bruker v. Town of Covington*, 69 Ind. 33; *Town of Gosport v. Evans*, 112 Ind. 133.

It is equally well settled that because one has knowledge that a highway or sidewalk in a town or city is out of repair, or even dangerous, he is not, therefore, bound to forego travel upon the same. *Town of Albion v. Hetrick*, *supra*; *City of South Bend v. Hardy*, 98 Ind. 577; *City of Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar, etc., Gravel Road Co.*, 83 Ind. 326; *Town of Gosport v. Evans*, *supra*.

But the care in such case to avoid injury must be in proportion to the danger the traveler might encounter by reason of the defect or obstruction. *City of Huntington v. Breen*, *supra*. In *Toledo, etc., R. W. Co. v. Brannagan, Adm.*, 75 Ind. 490, the court said: "Knowledge that there is a defect in a highway, making it dangerous to attempt to travel upon it, does not of

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itself make it negligence to use the highway carefully and cautiously. Knowledge of the existence of a dangerous place does, however, make it incumbent upon the traveler to use care and caution proportionate to the danger which he knows lies in his way." *City of Indianapolis v. Cook*, 99 Ind. 10; *Turnpike Company v. Jackson*, 86 Ind. 111.

In *Mount Vernon v. Dusouchett*, *supra*, the court said: "If a person knows there is an obstruction in a street, and he attempts to pass the place when, in consequence of the darkness of night, or of the rise of water over the street, he cannot see the obstruction, he has no reason to complain of the injury he may receive on the occasion."

In *Riost v. City of Goshen*, *supra*, which was an action to recover for an injury received in driving over a bridge, alleged to be "dangerous to all who should pass on the same," it was said, "The law is well settled, that if the plaintiff or his servant knew of the true condition of the bridge when the team and wagon were driven upon it, he cannot, under such circumstances, recover."

"But where there is danger, and the peril is known, whoever encounters it, voluntarily and unnecessarily, cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk." *Corlett v. City of Leavenworth*, 27 Kan. 673; *Schaefer v. City of Sandusky*, 33 Ohio St. 246; *Town of Gosport v. Evans*, *supra*.

"The law accounts it negligence for one, unless under compulsion, to cast himself upon a known peril, from which a prudent person might reasonably anticipate injury. *Morrison v. Board, etc.*, 116 Ind. 431.

"A man has no right to cast himself upon a known danger where the act subjects him to great peril. If there is a risk, apparent or known, that will probably

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result in injury, he must not encounter it." *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592.

It is true the appellee was required to exercise only ordinary care under the circumstances, and if he did exercise ordinary care, under all the circumstances, to avoid the injury, he cannot be charged with negligence contributing to the injury. But, as is said by McCabe, J., in *City of Bedford v. Neal*, 143 Ind. 425. "Ordinary care, however, is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under a different set of circumstances."

The facts as to the manner in which this injury occurred are undisputed and in such a case it becomes the province of the court to determine whether or not they amount to negligence. *Louisville, etc., R. R. Co. v. Eves*, 1 Ind. App. 224.

When appellee's horse became frightened at first sight of the obstruction, the appellee was fully apprised of the danger. Had this injury occurred when the horse first came upon the obstruction the appellee would have a far different case from the one presented by this record. He was under no compulsion to urge his horse a second time up to the object. He voluntarily and unnecessarily encountered the danger, and it cannot be said he was exercising ordinary prudence in doing so, but that he did so at his own risk. There was a failure on appellee's part to establish one of the indispensable elements of his cause of action, namely, that his own failure to exercise ordinary care under the circumstances did not contribute to bring about the injury of which he complains. This being true it is not necessary for us to decide whether, under the circumstances, the town of Salem was guilty of negligence in permitting the street to become in the condition it was.

Moore v. Horner.

In our opinion the verdict was not sustained by the evidence, and the court erred in refusing to grant a new trial.

The judgment of the court below is reversed with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion. All concur.

MOORE v. HORNER.

[No. 1,910. Filed May 13, 1895.]

APPEAL.—Jurisdiction of Supreme and Appellate Courts.—Action to Quiet Title.—Default.—An appeal from a judgment in a proceeding to be relieved from a default and judgment thereon, entered in an action to quiet title to real estate, must be to the Supreme Court.

From the Boone Circuit Court. *Transferred to the Supreme Court.*

Ira M. Sharp, for appellant.

Terhune & New, for appellee.

GAVIN, J.—Appellee filed a complaint to be relieved from a default and judgment quieting title to certain lands. Any appeal from the original judgment must have been to the Supreme Court. The same court has jurisdiction of an appeal from the proceedings to be relieved therefrom. *Dallin v. McIvor*, 12 Ind. App. 150.

Ordered transferred to the Supreme Court.

Horne v. The Western Refrigerating Company.

HORNE v. THE WESTERN REFRIGERATING COMPANY.

[No. 1,981. Filed April 15 1896.]

From the Grant Circuit Court. *Affirmed.*

William H. Carroll and Griffith D. Dean, for appellant.

P. B. Manley and E. E. Friedline, for appellee.

DAVIS, J.—The only error assigned in this court is that the trial court erred in overruling appellant's motion for a new trial. The only question discussed by counsel for appellant on this appeal is that the decision of the Circuit Court is not sustained by sufficient evidence.

The contention of counsel for appellee is that the eggs, in question, were sold and shipped by appellee to appellant on his individual credit. Counsel for appellant insist that the sale was to the R. H. Horne Produce Company and that there is no evidence in the record tending to prove that the eggs were bought by or for appellant, or on his account, or that they were delivered to him, or accepted by him, as his goods. In other words, the only controversy at the trial was whether the eggs were sold and delivered by appellee to appellant on his individual credit, or to him as agent for the R. H. Horne Produce Company.

We have carefully read the evidence. In our opinion the letter written by appellant to appellee, in connection with the other facts and circumstances in the case, when construed most favorably in behalf of the appellee, is sufficient to warrant the inference by the trial court that the eggs were sold and shipped by appellee to appellant on his individual credit. The fact that there is evidence in the record supporting appellant's theory of the transaction, that he did not buy the eggs on his individual credit, but that they were sold by appellee to the R. H. Horne Produce Company, and that in all that was done, the appellant was acting as the manager of the company, would not justify this court in reversing the judgment of the trial court. *Smith v. Stump*, 12 Ind. App. 859; *Haines v. Porch*, 9 Ind. App. 413.

Finding no reversible error in the record the judgment is affirmed.

Moore *et al.* v. McPheeters *et al.*

MOORE ET AL. v. MCPHEETERS ET AL.

[No. 1,904. Filed May 6, 1896.]

From the Monroe Circuit Court. *Affirmed.**John R. East and Robert G. Miller, for appellants.**J. B. Wilson, for appellees.*

REINHARD, J.—Action by appellees against appellants, who are husband and wife, on a promissory note. Answer of payment and general issue. Reply of general denial. Trial by court, and finding and judgment in favor of appellees on the note, together with interest and attorney's fees.

The only question presented for our determination is as to the sufficiency of the evidence to sustain the finding.

The note was given for a buggy purchased by the appellant, Mary D. Moore.

The principal issue was that of the payment of the note. There was evidence that the appellant Samuel J. Moore, husband of appellant, Mary D. Moore, transferred to the payees of the note a claim of \$50.00 on one Richard Baker, due said Mary D. Moore, and another account for \$25.00 for wood that was sold from the farm of said Mary D. Moore. The appellants credited these amounts on other indebtedness of Samuel D. Moore which was then due, claiming that no directions were given to apply the same on the note in suit, which was not due at the time the accounts were turned over. The other indebtedness from Samuel D. Moore was not denied and the undisputed evidence shows that the credits mentioned were applied to it, which consumed the entire amount of such credits. There was evidence to prove that no directions were given as to how the credits should be applied and that the appellant, Samuel D. Moore, who was the agent of his wife, knew that such credits were used in payment of his own indebtedness without objection on his part, or on the part of his wife, who had opportunities for knowing that the accounts were credited upon her husband's indebtedness.

Under these circumstances we cannot say that the uncontradicted evidence shows that the note in suit had been paid. The burden of proving its payment was on the appellants. If the \$75.00 credits were, by the consent of the wife, applied to the payment of her husband's individual debts, she was estopped to assert that they should have been applied to the extinguishment of the note. When all the evidence is considered we are unable to say that there was not some

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proof that appellant, Mary D. Moore, acquiesced in the placing of the credits upon her husband's accounts

Moreover, even if the entire amount of \$75.00 had been credited upon the note, it would not have paid the whole of it with the interest thereon. There was, therefore, some amount due the appellees on the note which they were entitled to recover, and this being true, they were also entitled to recover an attorney's fee. There was no reason or ground assigned in the motion for a new trial that the recovery was too large. No question can therefore arise on appeal upon the excessiveness of the recovery. Section 568, Burns' R. S. 1894, subd. 5; *Bartlett v. Burden*, 11 Ind. App. 419.

Judgment affirmed.

LAKE ERIE AND WESTERN RAILROAD COMPANY v.
CITY OF NOBLESVILLE.

[No. 2,263. Filed September 25, 1896.]

From the Clinton Circuit Court. *Affirmed*.

John B. Cockrum, and *Shirts & Kilbourne*, for appellant.

John F. Neal, for appellee.

GAVIN, J.—This case is upon its merits identical with that of *Lake Erie, etc., R. R. Co. v. City of Noblesville*, 15 Ind. App. 697. It is, therefore, affirmed.

STEADING v. STROUSE ET AL.

[No. 2,046. Filed Nov. 24, 1896. Rehearing denied Jan. 29, 1897.]

From the Marion Superior Court. *Affirmed*.

Upton J. Hammond and *Edwin St. George Rogers*, for appellant.

J. W. Holtzman and *J. M. Leathers*, for appellees.

LOTZ, C. J.—The appellees sued the appellant to recover commissions on the sale of real estate, and recovered judgment in the court below. The only error assigned in this court is the overruling of the motion for a new trial. It is insisted that the finding is contrary to

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the law and not supported by sufficient evidence. The appellant asserts that there was no evidence whatever to support the finding. We have given the evidence a careful consideration and find that there is some testimony tending to support the finding. It is true that such testimony is meager and unsatisfactory, but, under the familiar rule, this court will not weigh the evidence under such circumstances; the cause must, therefore, be affirmed.

Judgment affirmed.

ON PETITION FOR REHEARING.

COMSTOCK, C. J.—We have carefully considered the argument of the learned counsel on petition for rehearing, and have examined the questions presented by the record.

In our opinion, the conclusion reached by the court, as announced by Lotz, C. J., is correct.

The petition for rehearing is, therefore, overruled.

THE STATE v. HOUCK ET AL.

[No. 2,293. Filed November 24, 1896.]

From the Grant Circuit Court. *Reversed.*

W. A. Ketcham, Attorney General, and Ellis Bundy, for State.

Elliott & Elliott, John T. Strange and Ethan A. Huffman, for appellees.

GAVIN, J.—By section 248, Burns' R. S. 1894, the repeal of a criminal statute does not relieve an offender from prosecution for violations of the statute prior to its repeal, unless the repealing act shall so expressly provide. *State v. Hardman, ante, 557.*

Judgment reversed.

MILLS ET AL. v. BYRAM.

[No. 2,052. Filed December 2, 1896.]

From the Marion Superior Court. *Affirmed.*

B. F. Nysewander, for appellants.

C. E. Averill, for appellee.

LOTZ, C. J.—The only question arising on this appeal is presented by a bill of exceptions. There is a bill of exceptions in the record,

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signed by the presiding judge, but there is no certificate of the clerk showing that the bill was ever filed in the court below, or that the bill was a part of the proceedings in the court below. The clerk of the trial court should duly certify to the transcript and to all documents and papers which were a part of the proceedings in the court below, and which he transmits to this court. Without such certificate under the seal of that court this court has no means of knowing whether or not the record presented is the one upon which the court below rendered the judgment. *Dodge v. Morrow*, 14 Ind. App. 534.

Judgment affirmed.

KIRSHBAUM *v.* FARMERS' FIRE INSURANCE
COMPANY ET AL.

[No. 2,066. Filed January 29, 1897.]

From the Jay Circuit Court. *Affirmed.*

Cornelius Corwin, John M. Smith and Headington & LaFollette,
for appellant.

Richard H. Hartford for appellees.

ROBINSON, J.—The same questions are involved in this appeal as were in the case of appellant against *The Hanover Fire Insurance Company*, ante, 606, and upon the authority of that decision the judgment in this cause is affirmed.

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ABANDONMENT—When a husband who has abandoned his wife is liable for necessities, see **HUSBAND AND WIFE**, 2; *Stewart, Exx., v. Long*, 164.

ABSTRACTS OF TITLE—

Negligence.—*Complaint.*—*Priority of Liens.*—A judgment will not be reversed for sustaining a demurrer to a complaint for damages against an abstractor of titles, wherein it is alleged that plaintiff employed such abstractor to make an abstract of title to certain real estate, and such abstractor failed and neglected to show in such abstract, a mortgage existing against such real estate, which was duly recorded in the recorder's office, and by reason of such failure to so note said mortgage in the abstract, plaintiff, who was the holder of a tax deed to such real estate, in an action to quiet his title thereto, did not make the holder of such mortgage a party in such action, as plaintiff's lien for taxes was superior to that of the mortgage, and his failure to make the holder of the mortgage a party did not operate as a waiver of the priority of the tax lien. *Williams v. Hanly*, 464.

ACTION—The fact that a passenger purchased his ticket in Illinois does not support the proposition that the company is not liable for a tort in Indiana, see **RAILROADS**, 10; *Indiana, etc., R. R. Co. v. Masterson*, 323.

AFFIDAVIT—Sufficiency of, to charge violation of the law requiring room in which intoxicating liquors are sold to be on ground floor and fronting highway, see **INTOXICATING LIQUORS**, 1; *State v. Wickwire*, 348.

Sufficiency of, to charge public indecency, see **CRIMINAL LAW**; *State v. Cone*, 350.

AGENCY—As to agent's commission in negotiating conditional sale see **CONTRACTS**, 8; *Pape v. Romy. Admr.*, 470.

Signing of the name of a surety to a note at the latter's request and in his presence does not constitute such person so signing the agent of the surety so as to render him incompetent to testify to such fact after the death of the surety, see **EVIDENCE**, 1; *Tremain, Admr., v. Severin*, 447.

AGENT—See **PRINCIPAL AND AGENT**.

ALTERATION OF INSTRUMENT—As to the insertion of the name of bank in blank space after the words "Negotiable and payable at," see **BILLS AND NOTES**, 8; *Light v. Killinger*, 102.

AMENDMENTS—When may be made to pleadings after close of evidence and conclusion of argument, see PLEADING, 36; *Diltz v. Spahr*, 591.

ANSWER—See PLEADING.

No single pleading can serve the double purpose of an answer and a counterclaim, see PLEADING, 29; *Huber Mfg. Co. v. Busey*, 410. When amounts to an argumentative denial, see PRACTICE, 4; *Krishbaum v. Hanover Fire Insurance Co.* 606.

Immaterial averments in, will be treated as surplusage and need not be proved, see PLEADING, 31; *Kniss v. Holbrook*, 229.

A paragraph of answer which is pleaded in bar of the entire action is bad where it does not answer the entire complaint, see PLEADING, 28; *State, ex rel. v. Tomlinson*, 662.

Where there are two paragraphs of answer one in confession and the other in denial, plaintiff cannot treat the former as dispensing with proof of the facts put in issue by the paragraph of denial, see PLEADING, 27; *People's Mut. Benefit Soc. v. Templeton*, 126.

Sustaining a demurrer to a paragraph of answer is not reversible error where the same facts were alleged in a remaining paragraph of answer, see APPEAL AND ERROR, 2; *Beist v. Sipe*, 4.

APPEAL AND ERROR—

1. *Jurisdiction of Supreme and Appellate Courts.*—*Action to Quiet Title.*—*Default.*—An appeal from a judgment in a proceeding to be relieved from a default and judgment thereon, entered in an action to quiet title to real estate, must be to the Supreme Court.
Moore v. Horner, 694.

2. *Pleading.*—*Answer.*—Sustaining a demurrer to a paragraph of answer is not reversible error, although the paragraph was good, where the same defense alleged therein was set up in another paragraph which is not held bad.
Beist v. Sipe, 4.

3. *Pleading.*—*Answer.*—*Demurrer.*—An order overruling a demurrer to a bad answer will not be disturbed on appeal where the complaint is also bad.
Grace v. Cox, 150.

4. *Immaterial Variance Between Complaint and Evidence.*—Immaterial variances between the complaint and the evidence, which were amendable even after verdict, will be disregarded by the Appellate Court.
Clark v. Trueblood, 98.

5. *Objection to Form of Judgment Must be Made in Trial Court.*—When no exception was taken to the form of judgment in the court below, and no motion made to modify, the question can not be raised on appeal.
Dederick v. Brandt, 264.

6. *Nominal Damages.*—A judgment will not be reversed for sustaining a demurrer to a complaint for damages which at most shows that plaintiff is entitled only to nominal damages.
Williams v. Hanly, 464.

7. *Joint Assignment of Error.*—A specification of error that "the court erred in sustaining the demurrer of the appellee to the third, fourth, fifth, sixth and eighth paragraphs of appellant's answer," is a joint assignment and must fail if any one of the paragraphs is bad.
Town of Petersburg v. Petersburg Electric, etc., Co., 151.

8. *Joint Assignment of Error.*—Where an exception is made to the instructions given as an entirety, unless all the instructions given were erroneous an appeal thereon cannot be sustained.
Stewart, Exx., v. Long, 164.
9. *Joint Assignment of Error.—Failure to Argue Error Assigned.*—An assignment of error made jointly to the ruling of the court in sustaining a demurrer to two paragraphs of a pleading is insufficient if either of them is good, and where such ruling as to one of the paragraphs is not attacked in the appellant's argument, such failure to argue will constitute a waiver as to both paragraphs.
Bryant v. Stout, 380.
10. *Assignment of Errors.—Instructions.*—An assignment that the court erred in giving a series of instructions designated by number "and to the giving of each of said instructions" is a several and not a joint assignment of errors.
Clark County Cement Co. v. Wright, Admr., 630.
11. *Failure to Name Defaulting Defendant in Assignment of Errors.*—An appeal will not be dismissed for the failure of the appellant to name in his assignment of errors a defendant that had been defaulted, where the appellee's joinder in error was filed at the time of the assignment of errors, and the motion to dismiss not filed until nearly six months thereafter, and until more than three months after the filing of appellant's brief, and the presence of such defaulting defendant was not necessary for a decision of the case, and his absence in no way prejudicial to appellee.
Allen v. Rice, 572.
12. *Bill of Exceptions.—When Original Must Be Copied.*—It is only when the stenographer's report of the evidence is incorporated in the bill of exceptions that the original bill may be certified up as a part of the record. All other bills of exception must be copied by the clerk.
Stark v. Owens, 345.
13. *Bill of Exceptions.—Record.*—When time is given beyond the term to file a bill of exceptions, this fact must appear from the record by order-book entry, and not by statement in the bill of exceptions.
Gemmell v. State, ex rel., 154.
14. *Bill of Exceptions.*—A bill of exceptions, even though it contains the original longhand manuscript of the evidence, should be embodied in the transcript of the record, and not merely attached to the transcript or filed as an independent document.
Huber Manufacturing Co. v. Busey, 410.
15. *Bill of Exceptions.—Motion for New Trial.*—The time allowed for filing a bill of exceptions upon the overruling of a motion for a new trial covers only matters relating to the trial, and does not include collateral motions, such as to make more specific, made and overruled before issues closed, and which do not constitute causes for new trial.
Baltimore, etc., R. R. Co. v. Countryman, Assignee, 159.
16. *Bill of Exceptions.—Longhand Manuscript of Evidence.*—The record must affirmatively show that the bill of exceptions was properly filed with the clerk after it had been signed by the court, and that the longhand manuscript of the evidence was filed with clerk before it was incorporated in the bill of exceptions.
Kelso v. Kelso, 615.
17. *Interrogatories to Jury.—New Trial.*—The submission or refusal to submit interrogatories to a jury as a part of its special verdict, is a matter arising upon the trial, and unless the rulings of the trial court is made a cause for a new trial they cannot be assigned as error on appeal.
National Fire Ins. Co. v. Strebe, 110.

18. *Instructions.—Presumption.*—It will be presumed on appeal that instructions tendered and refused, were refused because they were not tendered in time, where the record does not affirmatively show that they were tendered before the argument was commenced.
Lofland v. Goben, 67.
19. *Review of Instructions.—Evidence Not in Record.—Statute Construed.*—Under section 642, Burns' R. S. 1894, providing that on appeal it shall not be necessary to embrace the entire record, but only such parts as will enable the appellate tribunal to understand the particular question involved, and under Rule xxix. of the appellate court providing that where the evidence is not all in the record, the trial judge must certify that there was competent evidence introduced at the trial material to the point covered by the instructions, etc., the correctness of instructions given or refused will not be considered on appeal in the absence of such certificate from the trial judge, unless the evidence is in the record.
Geiger, Tr., v. Huenneke, 326.
20. *Instruction.*—A judgment will not be reversed for refusal of a correct instruction, unless the record affirmatively shows that such instruction was tendered to the court before the argument was commenced as provided by section 542, Burns' R. S. 1894 (533, R. S. 1881).
Lofland v. Goben, 67.
21. *Review of Evidence.*—If there is no evidence to support the verdict or finding, or if there is no evidence to support any material fact essential to the verdict or finding, then such verdict or finding is an error of law and may be reviewed on appeal; on the other hand if there is some evidence to support each material fact essential to the verdict or finding, there can be no review.
Simons, Admr., v. Beaver, 492.
22. *Evidence.*—Objections to the admission of evidence, not stated at the time it was objected to, cannot be urged on appeal.
Aetna Ins. Co. v. Strout, 160.
23. *Harmless Error.*—It is not reversible error to refuse to permit a witness, who testified that he bought a stock of goods for \$1,100, partly for cash and partly on credit, and that the stock was worth only \$1,000 cash, to state that he paid the \$100 more because he bought on credit.
Stewart, Exx., v. Long, 164.
24. *Special Finding.*—A finding of fact by the court which is supported by evidence will not be disturbed on appeal.
Kirshbaum v. Hanover Fire Insurance Co., 606.
25. *Special Finding.*—When a finding of fact made by the court is within the issues presented by the pleadings, and is supported by the evidence it cannot be contrary to law.
Ib.
26. *Contributory Negligence.—Verdict.*—The burden of showing on appeal that a general verdict for plaintiff is wrong because plaintiff was guilty of contributory negligence, rests upon defendant.
Indianapolis Union R. W. Co. v. Neubaucher, 21.
27. *Presumption.*—It will not be presumed on appeal that the plaintiff's intestate knew of certain defects in machinery in the face of an allegation in the complaint that he did not know of them.
Clark County Cement Co. v. Wright, Admr., 630.
28. *Verdict of Trial Court not Disturbed if Substantial Justice is Done.*—A verdict will not be disturbed on appeal unless it appears that substantial justice has not been done.
Ib.
29. *Failure to Discuss Error.—Waiver.*—An assignment of error that is not discussed will be deemed to have been waived.
Town of Petersburg v. Petersburg Electric, etc., Co., 151.

ASSAULT AND BATTERY—Excessive and unreasonable punishment of child by parent, see **PARENT AND CHILD**; *Hornbeck v. State*, 484.

ASSIGNMENT—As to the assignment of a life insurance policy by parol, see **INSURANCE**, 15, 16, 17; *State, ex rel. v. Tomlinson*, 662. *Right of Action for Damages Caused by Fire Escaping from Railroad Right of Way is Assignable.*—The right of action against a railroad company for damages caused by fire escaping from the railroad company's right of way is assignable. *Baltimore, etc., R. R. Co. v. Countryman, Assignee*, 159.

ASSIGNMENT OF ERROR—As to joint assignment of error, see **APPEAL AND ERROR**, 7, 8, 9, 10; *Town of Petersburg v. Petersburg Electric, etc., Co.*, 151; *Stewart, Exx. v. Long*, 164; *Bryant v. Stout*, 380; *Clark County Cement Co. v. Wright, Admr.*, 630.

Failure to name defaulting defendant in, may not be prejudicial error; see **APPEAL AND ERROR**, 11; *Allen v. Rice*, 572.

ATTORNEY AND CLIENT—Sufficiency of evidence to show that note has been placed in hands of attorney for collection, see **EVIDENCE**, 11; *Rouyer, Admx., v. Miller*, 519.

ATTORNEY'S FEES—When should be included in a tender of the amount due upon a promissory note providing for attorney fees, where the note is in the hands of an attorney for collection, see **TENDER**, 1, 2; *Rouyer, Admx., v. Miller*, 519.

1. *When the Amount of Fees is Fixed in Note.*—The amount of attorney's fees fixed in a note is *prima facie* the sum recoverable, subject to be reduced by proof that such sum is unreasonable and excessive, or that the plaintiff has not incurred a liability to pay the full amount. *Ib.*
2. *When May be Recovered.*—Where a note stipulates for the payment of attorney's fees, such fees are recoverable if the note has been placed, after maturity, in the hands of an attorney for collection, and a liability for services has been incurred by payee. *Ib.*

AUDITOR—See **COUNTY AUDITOR**.

BAIL—

Quashing Indictment.—By the quashing of an indictment, and the discharge of the defendant, the recognizance bond becomes inoperative and void, and is not revived by the filing of an affidavit and information against him on the same charge during the same term of court. *State v. Clerk*, 137.

BANKRUPTCY—Purchase of note by maker who has been discharged in bankruptcy, see **BILLS AND NOTES**, 5; *Mattix, Admx., v. Leach*, 112.

Partnership Debt.—An individual discharge in bankruptcy, purporting to relieve the bankrupt from all debts provable against him, operates upon partnership as well as individual debts, although the partnership was not brought into bankruptcy. *Ib.*

BASTARDY—

1. *Evidence.*—*Engagement to Marry.*—Evidence of an engagement to marry between the accused and the relatrix in a bastardy pro-

ceeding, is admissible to show the relation upon which they stood to each other. *Gemmill v. State, ex rel.*, 154.

2. *Evidence*.—Evidence of the time and frequency of acts of sexual intercourse occurring near the time of conception, between the accused and relatrix in a bastardy proceeding, is admissible where the accused has admitted having sexual intercourse within a short time thereafter, but denies the particular act resulting in conception. *Ib.*
3. *Evidence*.—*Cross-Examination of Defendant*.—*Letters*.—It is not error to permit the defendant in a bastardy proceeding to be asked on cross-examination if he wrote certain extracts from letters which were read by counsel for relatrix, such extracts containing statements contradictory to his testimony in chief, and not being garbled or wrested from their proper meaning, the entire letters having been subsequently offered and read in evidence. *Ib.*

BILL OF EXCEPTIONS—How made part of the record, see **APPEAL AND ERROR**, 14, 16; *Huber Mfg. Co. v. Busey*, 410; *Kelso v. Kelso*, 615; *Pittsburgh, etc., R. W. Co. v. Cope*, 579.

When time is given beyond term to file, it must appear from the record by order-book entry; see **APPEAL AND ERROR**, 13; *Gemmill v. State, ex rel.*, 154.

When copy of original is required in record, see **APPEAL AND ERROR**, 12; *Stark v. Owens*, 345.

1. *Motion to Make More Specific*.—*Record*.—In order to present any question upon the overruling of a motion to make more specific, it must be brought into the record by bill of exceptions or special order; if time is given beyond the term to file same, the fact must appear from the record outside of the bill. *Baltimore, etc., R. R. Co. v. Countryman, Assignee*, 139.
2. *Signature of Judge*.—*Mandamus*.—Ninety days' time was given for appellant to file bill of exceptions. Two days before the expiration of said time appellant's counsel called to secure the signature of appellee, who as special judge had tried the cause, but appellee was absent from home at the time and did not return for several days thereafter. Counsel for appellant thereupon caused the clerk to indorse on the bill of exceptions that the same had that day been presented for the signature of the judge, and the counsel took it but failed to present it for the judge's signature until nine months had elapsed, during all of which time the judge (appellee) was almost continuously at home. The judge refused to sign the bill. *Held*, in an action by appellant to mandate the judge that the judge properly refused to sign the bill of exceptions. *State, ex rel. v. White, Special Judge*, 260.

BILLS AND NOTES—Sufficiency of complaint in action on lost note, see **PLEADING**, 8, 11; *Clark v. Trueblood*, 98.

Variance between complaint and exhibit in action on lost note, see **PLEADING**, 9; *Ib.*

When attorney's fees may be collected, see **ATTORNEY'S FEES**, 2; *Rouyer, Adm.*, etc., v. *Miller*, 519.

The amount of attorney's fees fixed in a note is *prima facie* the sum recoverable, see **ATTORNEY'S FEES**, 1; *Ib.*

1. *Negotiable Instruments.—Note Given for Patent Right.*—A note given in consideration of a conveyance of a patent right, which does not contain the words "given for a patent right," or words of like import, is invalid in the hands of one who accepts it with full knowledge of the consideration for which it was given.
Lofland v. Goben, 67.
2. *Note Given for a Patent Right, When Voidable.*—A note given for a patent right which does not contain the words "given for a patent right" as required by section 8131, Burns' R. S. 1894 (6055, R. S. 1881), is not void, but voidable only.
Kniss v. Holbrook, 229.
3. *Alteration of Instrument.*—The validity of a note having all the essentials of negotiability except the name of a bank at which it is payable is not destroyed by the insertion therein, by the legal holder, of the name of a bank in the blank space after the words "negotiable and payable at," where the insertion was merely by way of a memorandum, and was made in lead pencil, and in a different handwriting from that in the body of the note, and no attempt was made or intended to be made to transfer it to an innocent purchaser, and the action is on the note in its original condition.
Light v. Killinger, 102.
4. *Executory Sale of Note.*—The sale of a negotiable promissory note is executory merely, and the title does not pass, where at the time of the contract of sale the note was not delivered, and the time for delivery was not fixed, although there was a partial payment at the time of sale, and further future payments of the consideration.
Mattix, Adm'r., v. Leach, 112.
5. *Purchase of Note by Maker Who Has Been Discharged in Bankruptcy.*—A creditor who sells a claim to a debtor who is under no legal liability to pay the same, because of his discharge in bankruptcy, cannot thereafter question his capacity to purchase on the ground that such debtor would not be permitted to enforce it against his sureties.
Ib.
6. *When Maker of Note is Estopped from Denying Validity.*—The maker of a note is estopped from denying its validity as against one who purchased it for a valuable consideration on the faith of his assurance that the note was all right and that he would pay it.
Kniss v. Holbrook, 229.
7. *Liability of Endorser.*—The assignor of a note not payable in bank by his indorsement warrants the liability and ability of the maker to pay it, and is bound, if due diligence be used by the holder, to make good his warranty, but cannot be sued in the same action with the maker as can the endorser of a note payable in bank.
Clark v. Trueblood 98.

BOND—See **BAIL**.

Sufficiency of complaint in action on official bond, see **PLEADING**, 1;
Leavell v. State, ex rel., 72.

As to liability of bondsmen of water works superintendent for water rents collected, see **OFFICERS**, 3; *Town of Salem v. McClintock, 656.*

Liability of bondsmen of a saloonkeeper for damages resulting from sales of liquor to minor, see **INTOXICATING LIQUORS**, 2, 3; *Reath v. State, ex rel., 146.*

Official Bond.—Statutes Construed.—The Act of March 5, 1889 (section 7692, Burns' R. S. 1894), providing that payment to or collection by the Attorney-General of any funds which county or State officers shall refuse to pay over to the proper custodian, shall not render

such officers liable to an action on their bonds by any other officer or person, is limited to liability for the funds so paid over, and does not repeal Act of June 5, 1888, providing for the recovery by the State from such officers and sureties, the amount paid as fees to the Attorney-General. *Leavell v. State, ex rel., 72.*

BRIBERY—

Hiring Elector to Refrain from Voting.—Within the meaning of section 6325, Burns' R. S. 1894 (1396, E. S.), providing that whoever hires any elector to vote or refrain from voting any ticket, or for any candidate, shall become liable to the person hired to vote or to refrain from voting in the penalty of \$300.00, it is not essential to a "hiring" that the elector shall have actually carried out his agreement to vote or refrain from voting. *Thompson v. State, ex rel., 84.*

BROKERS—

Commission.—Special Finding.—A special finding, in an action for a commission of four per cent. on \$8,000.00 for negotiating a loan for that amount, which shows that defendant orally promised plaintiff a commission of four per cent. on \$8,000.00, if he would procure some person to make him a loan of that sum on certain real estate, and that plaintiff negotiated with a copartnership for the purpose of making such loan and had a member of such firm to inspect the real estate, introduced him to defendant and obtained his personal consent to make the loan, but after consulting with his copartners the loan was declined by the copartnership, but the party who inspected the premises, in his individual capacity, made defendant a loan of \$2,000.00 on such real estate without the knowledge of plaintiff, will not support a conclusion of law that defendant was indebted to plaintiff and entitled to recover the sum of \$80.00, being a commission of four per cent. of \$2,000. *Diltz v. Spahr, 591.*

BURDEN OF PROOF—Is on plaintiff, in an action for the death of an employe, to show that intestate had no knowledge of defective machinery, see **MASTER AND SERVANT**, 3; *Clark County Cement Co. v. Wright, Admr., 630.*

Where no issue is formed on the complaint and the only issue is upon a counterclaim filed by defendant, the defendant has the burden of proof and has the right to open and close, see **TRIAL**, 1, 2; *Brower v. Nellis, 183; Rouyer, Admx., v. Miller, 519.*

CARRIERS—When sleeping-car company is liable as a common carrier, see **SLEEPING-CAR COMPANIES**, 2; *Voss v. Wagner Palace Car Co., 271.*

1. *Street Railway.—Injury to Passenger.*—A street railway company is not liable for injury to a passenger able to travel upon the cars without the aid of an attendant, where the injury is caused by other passengers jostling and pushing her, and one passenger stepping upon her dress as she was alighting, where it is shown that the conductor was at the time upon the ground assisting a child in her care to alight. *Ferguson v. Citizens' Street R. W. Co., 171.*
2. *Who is a Passenger.*—One who is riding on a railroad train, free of charge, by the "invitation and permission" of the conductor is not a passenger so as to entitle him to recover for injuries received. *Stalcup v. Louisville, etc., R. W. Co., 584.*

CHattel Mortgages—Labor liens are superior to, see **LIENS**, 1, 2, 3; *Bell v. Hiner*, 184.

1. *Must be Recorded in County Where Mortgagors Reside*.—Under section 6638, Burns' R. S. 1894, a chattel mortgage to be valid, as to persons not parties thereto, must be recorded in the county where the mortgagors reside, and within ten days after its execution. *State, ex rel. v. Griffin*, 555; *Morris v. Ellis*, 679.
2. *Residence of Mortgagors. — Burden of Proof*.—Where in an action against a constable and his bondsmen it is charged that such constable levied execution on, and sold certain personal property that was covered by mortgage, the burden of proof is on the plaintiff to show that the mortgagors reside in the county where the mortgage was recorded. *State, ex rel. v. Griffin*, 555.

CITIES—See **MUNICIPAL CORPORATIONS**.

COMMISSION—For negotiating loan, see **BROKERS**; *Diltz v. Spahr*, 591.

Of agent for negotiating conditional sale, see **CONTRACTS**, 8; *Pape v. Romy, Admr.*, 470.

COMPLAINT—See **PLEADING**.

Construction of language used in, see **PLEADING**, 23; *Morris v. Ellis*, 679.

Sufficiency of in an action on account against a town, see **PLEADING**, 14; *Town of Petersburg v. Petersburg Electric Light Co.*, 151.

Sufficiency of in an action on official bond, see **PLEADING**, 1; *Leavell v. State, ex rel.*, 72.

Sufficiency of in an action for breach of contract by purchaser of an executed sale of personal property, not accompanied by delivery, see **SALES**, 5; *Ridgley v. Mooney*, 362.

When in an action on contract the consideration should be specially alleged, see **PLEADING**, 2; *Louisville, etc., R. R. Co. v. Barnes*, 312.

Sufficiency of in an action for conversion, see **PLEADING**, 3, 4; *Stewart, Exx., v. Long*, 164.

Sufficiency of in an action for damages for personal injuries, see **PLEADING**, 5, 6, 7, 16; *Summit Coal Co. v. Shaw*, 9; *Clark County Cement Co. v. Wright, Admr.*, 630.

Sufficiency of in an action for damages by lessee against lessor for failure to deliver possession, see **DAMAGES**, 3; *Loufer v. Stottlemeyer*, 221.

Sufficiency of in an action on an insurance policy, see **INSURANCE**, 1; *Aetna Ins. Co. v. Strout*, 160.

Necessary allegations in an action on insurance policy, see **PLEADING**, 20, 21; *National Fire Ins. Co. v. Strebe*, 110; *Ohio Farmers' Ins. Co. v. Stowman*, 205.

Sufficiency of, in action on lost note, see **PLEADING**, 8, 11; *Clark v. Trueblood*, 98.

Necessary allegations as to payment of premium in action on insurance policy, see **PLEADING**, 21; *Ohio Farmers' Ins. Co. v. Stowman*, 205.

- When need not allege proof of loss as required by policy in an action on insurance policy, see PLEADING, 20; *National Fire Ins. Co. v. Strebe*, 110.
- Sufficiency of in an action against a railroad company for damages from fire escaping from right of way, see RAILROADS, 2; *Chicago, etc., R. R. Co. v. Long*, 401.
- Necessary allegations as to county in which animals were killed in an action against a railroad company for the unlawful killing of stock, see PLEADING, 19; *Lake Erie, etc., R. R. Co. v. Rinker*, 334.
- Sufficiency of in an action to recover penalty for a violation of city ordinance, see PLEADING, 12, 13; *Lake Erie, etc., R. R. Co. v. City of Noblesville*, 20.
- Necessary allegation in complaint by assignee of claim against a railroad company for damages caused by fire escaping from right of way, see PLEADING, 18; *Baltimore, etc., R. R. Co. v. Countryman, Assignee*, 139.
- Necessary allegations as to residence of mortgagor in an action to foreclose chattel mortgage, see PLEADING, 15; *Morris v. Ellis*, 679.
- An omission from a complaint, in an action by a receiver, that he was granted permission by court to bring the action, is not cured on appeal by sections 348, 401 and 670, Burns' R. S. 1894, see PLEADING, 22; *Rhodes v. Hilligoss, Rec.*, 478.
- If a complaint is based on one theory it cannot be sustained upon some other, see PRACTICE, 1; *Indianapolis Union R. W. Co. v. Neubaucher*, 21.
- Immaterial allegations in, need not be proved, see RAILROADS, 1; *Ib.*
1. *Negligence. — Proximate Cause. — Sufficiency of Averments of Negligence Constituting the Proximate Cause of the Injury. — Death by Natural Gas Explosion.*—A complaint against a natural gas company which avers that defendant negligently and knowingly suffered its pipe lines to become rusted and rotten and incapable of controlling and retaining the natural gas thereby conveyed, and continued to use such pipes for the purpose of conveying gas when it knew same to be in such defective condition, and that by reason of such negligence one of its pipes sprung a leak at a point in front of the building in which plaintiff's intestate was engaged in working and permitted gas to escape and be discharged into the earth through which it permeated and found its way, accumulating in large quantities beneath and into the said building, and exploding when it came in contact with fire, by force of which explosion such building was blown down, causing the death of plaintiff's intestate, sufficiently charges that defendant's negligence was the proximate cause of the death of plaintiff's intestate. *Alexandria Mining and Exploring Co. v. Irish, Admr.*, 634.
 2. *Negligence. — Necessary Averments as to Freedom from Fault.*—In an action for damages based upon the negligence of defendant, a general averment of freedom from negligence on part of plaintiff is sufficient, unless the court can say from the facts pleaded, as a matter of law, that plaintiff contributed to his injury. *Ib.*

No single pleading can serve the double purpose of an answer and a counterclaim, see PLEADING, 29; *Huber Mfg. Co. v. Busey*, 410.

Containing same matter pleaded in answer, see HARMLESS ERROR, 3; *Angelmyer v. Blackburn*, 352.

COUNTY AUDITOR—Has no power to bind the county to pay for election supplies to be used eighteen months in the future and more than eleven months after the expiration of his term of office, see OFFICERS, 2; *Morrison & Co. v. Board, etc.*, 317.

COURTS—An appeal from a proceeding to be relieved from a default, in an action to quiet title to real estate, must be to the Supreme Court, see APPEAL AND ERROR, 1. *Moore v. Horner*, 694.

CRIMINAL LAW—

Public Indecency.—Sufficiency of Affidavit.—Under section 2081, Burns' R. S. 1894, providing that whoever being over fourteen years of age, uses or utters any obscene or licentious language or words in the presence of any female is guilty of public indecency, etc., if the language is not obscene or licentious *per se* it must be shown by extrinsic averments that it was used in an obscene or licentious sense and was so understood by the female. *State v. Cone*, 350.

DAMAGES—See NEGLIGENCE.

Measure of for breach of contract of purchase, see CONTRACTS, 7; *Indiana Canning Co. v. Priest*, 445; SALES, 4; *Ridgley v. Mooney*, 362.

From fire escaping from right of way of railroad, see PLEADING, 18; *Baltimore, etc., R. R. Co. v. Countryman, Assignee*, 139.

Resulting from illegal sale of liquor to minor, see INTOXICATING LIQUORS, 2, 3; *Reath v. State, ex rel.*, 146.

A judgment will not be reversed for sustaining a demurrer to a complaint for damages which shows plaintiff entitled to only nominal damages, see APPEAL AND ERROR, 6; *Williams v. Hanly*, 464.

1. *Diverting Water From Its Natural Course.*—It is an actionable wrong for one landowner to divert the natural course of water that falls upon his lands, and cast it upon the lands of others to their injury. *Rarey v. Lee*, 121.

2. *Diverting Water From Its Natural Course.—Special Verdict.*—In an action for damages for unlawfully flowing water on plaintiff's lands, a special verdict which finds that the flow of water was principally due to the natural lay of the land, but that "some water" which would not naturally have flown upon plaintiff's land, was turned upon it by a ditch constructed by defendant, is not sufficient to support a judgment for any amount in the absence of a finding that an appreciable amount of the damage was due to the water which came through the ditch. *Ib.*

3. *Action by Lessee Against Lessor.—Complaint.*—A complaint by lessee against a lessor for damages for failure to deliver possession of a farm need not allege that the defendant is the owner of the land, nor that plaintiff had complied with his part of the contract, if the complaint shows that plaintiff was unable to perform his part of the contract by defendant's wrong in keeping him from such performance. *Loufer v. Stottlemeyer*, 221.

for such interest, where the purchaser exercised the privilege so agreed upon and transferred the interest so purchased back to the owner and received the purchase price with interest.

Pape v. Romy, Admr., 470.

9. *Claim Against Decedent's Estate for Work and Labor.*—The failure of testator to make a bequest in favor of one who rendered services to him upon a promise that such services should be paid for by such bequest, renders his estate liable for the value of such services.
Purviance, Admr., v. Shultz, 94.

10. *Statute of Frauds.*—An oral promise by a corporation to pay the remainder of the purchase money of land purchased for such corporation by one who takes the title in his own name, giving back a note and mortgage for the balance of the purchase price, is not within the statute of frauds.

Bedford Belt R. W. Co. v. Winstandley, 143.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.

Scope of instructions on the issue of contributory negligence, see INSTRUCTIONS, 4; *Summit Coal Co. v. Shaw, 9.*

When traveler is not guilty of in crossing railroad track, see RAILROADS, 6; *Indianapolis Union R. W. Co. v. Neubaucher, 21.*

Passenger on freight train who leaves her seat to get a drink of water for her child is not guilty of contributory negligence so as to preclude her from the recovery for damages caused by a negligent stopping of the train, see RAILROADS, 8; *Indiana, etc., R. W. Co. v. Masterson, 323.*

Where one is riding in a vehicle as the guest of the driver it is no less his duty than it is the duty of the driver to look and listen when approaching a railroad crossing, see NEGLIGENCE, 2, 3; *Lake Shore, etc., R. W. Co. v. Boyts, 640.*

Plaintiff must be shown to be free from contributory negligence in an action for damages against a railroad company for negligently causing a fire, see RAILROADS, 7; *Louisville, etc., R. W. Co. v. Porter, 266.*

In an action for damages for personal injuries plaintiff must allege and prove his freedom from contributory negligence, see DAMAGES, 4; *Town of Salem v. Walker, 687; Lake Shore, etc., R. W. Co. v. Boyts, 640.*

Horseman in Use of Street.—A horseman who is apprised of an obstruction in a street at which his horse took fright and turned back, and voluntarily rides the horse a second time to the place of obstruction and is thereby thrown from his horse and injured, is guilty of contributory negligence so as to preclude a recovery in an action against the municipality.

Town of Salem v. Walker, 687.

CONVERSION—Sufficiency of complaint in action for, see PLEADING, 3, 4; *Stewart, Exr., v. Long, 164.*

COUNTERCLAIM—Is not subject to demur if a right to recover is disclosed as to any of the items declared on, see PLEADING 32; *Anglemyer v. Blackburn, 352.*

EVIDENCE—Objections made to the admission of evidence must be stated at the time it is objected to, see **APPEAL AND ERROR**, 22; *Aetna Ins. Co. v. Strout*, 160.

Which was properly admissible in chief to sustain the defense, may be rejected when offered in sur-rebuttal, see **PRACTICE**, 8; *Brown v. Hiatt*, 340.

When in an action for violation of city ordinance, proof of publication is necessary, see **PLEADING**, 13; *Lake Erie, etc., R. R. Co. v. City of Noblesville*, 20.

Deed absolute in form may be shown by parol to have been intended as a mortgage, see **MORTGAGES**, 3, 4; *Kelso v. Kelso*, 615.

Parol evidence admissible to identify property covered by policy. see **INSURANCE**, 11; *Aetna Ins. Co. v. Strout*, 160.

When parol evidence admissible to show a transaction to be independent of a written contract between the parties, see **CONTRACTS**, 6; *Springfield Fertilizer Co. v. Tompkins*, 403.

Extracts from letters written by accused to relatrix in a bastardy proceeding, when admissible on cross-examination of accused, see **BASTARDY**, 3; *Gemmill v. State, ex rel.*, 154.

When evidence of the time and frequency of acts of intercourse between the accused and relatrix in a bastardy proceeding is admissible, see **BASTARDY**, 2, 3; *Ib.*

Evidence of an engagement to marry between the accused and relatrix in a bastardy proceeding is admissible to show the relation in which they stood to each other, see **BASTARDY**, 1; *Ib.*

Where there is no evidence to support the finding such finding is an error of law and may be reviewed on appeal, see **APPEAL AND ERROR**, 21; *Simons, Admr., v. Beaver*, 492; *Brown v. Hiatt*, 340; *Parr v. Cutsinger*, 561.

1. *Admissibility of, in an Action on Claim Against a Decedent's Estate.—Agency.—Statute Construed.*—The signing of the name of a surety to a note, at the latter's request, and in his presence by one of the makers, does not constitute such maker an agent and render him incompetent to testify to such fact after the death of surety, in an action against his estate on such note under section 508, Burns' R. S. 1894, providing that "No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness, in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent."

Tremain, Admr., v. Severin, 447.

2. *Admissibility of.—Parol Promise to Pay a Debt Barred by Statute of Limitations.*—Parol evidence of statements of defendant at times other than when the payment on the note in suit was made, acknowledging the debt and promising to pay the same is admissible to rebut evidence of an agreement that such payment should be in full satisfaction of the debt. *Brudi v. Trentman*, 512.
3. *Account Book, When Admissible.*—A page of decedent's account book is not admissible in evidence without proof as to when and where the entries were made, and that they were made in decedent's handwriting. *Rouyer, Admr., v. Miller*, 519.

4. *Character.—Specific Acts.*—Evidence of specific acts of lascivious or immoral conduct of a woman five or six years prior to her alleged adultery with a man other than the one with whom such acts were committed, is not admissible to prove her bad character for chastity. *Robertson v. Hamilton, 328.*
5. *Res Gestae.—Slander.*—On the trial of an action for slander brought by a married woman, based upon a statement of the defendant that the plaintiff had been guilty of adultery with one C, the defendant produced a witness by whom he proved that sometime before the time of the alleged slander, witness met the plaintiff and her husband in the public highway; that plaintiff was crying, and upon being asked by witness what was the matter, she replied that her husband could tell him; that after further conversation showing that there had been some trouble or misunderstanding between them, the plaintiff asked witness to take her husband and keep him over night. Defendant offered to prove that after the witness had started away, and in the absence of the plaintiff, the husband told witness that his wife had confessed to having been guilty of adultery with C. *Held*, that the evidence offered was not a part of the *res gestae*, and was inadmissible. *Ib.*
6. *Natural Gas Explosion.—Defective Pipes.—Practice.*—In an action against a natural gas company for death caused by an explosion of gas escaping from its pipe in the street by reason of alleged defects in such pipe at a certain point, evidence of defects in such pipe line at other points, although not discovered until after such explosion, was admissible as tending to show that the condition of the pipe at the time of the examination, or when the condition was observed, was such as to indicate that the defects had existed prior to the time of the injury complained of. *Alexandria Mining, etc., Co. v. Irish, Admr., 534.*
7. *Natural Gas Explosion.—Practice.*—When the gas company introduces evidence of an explosion subsequent to the one for which it is sought to be held responsible, it cannot question the competency of other evidence as to such explosion, introduced for the purpose of showing the condition of the pipe at the time of the explosion in question, although the evidence introduced by it was for another purpose. *Ib.*
8. *Natural Gas Explosion.—Notice of Unsafe Condition of Pipes.*—As tending to prove notice to a natural gas company of the unsafe condition of its pipe line, in an action for death resulting from an explosion of gas escaping from its pipes, it was proper for plaintiff to show by the mayor of the city in which the lines were located that before the explosion he informed one of defendant's men, who had control of the line, of the unsafe condition of the pipes and that he thought the high pressure line should be taken up. *Ib.*
9. *Judicial Notice.—Explosive Quality of Natural Gas.*—Courts know judicially that natural gas is highly explosive and combustible, and that it will explode when ignited by fire. *Ib.*
10. *Expert Witness.—Hypothetical Question.*—It is improper to ask an expert witness to give an opinion based upon his recollection of the testimony of another witness. The assumed facts upon which an opinion is desired should be stated hypothetically. *Bedford Belt R. W. Co. v. Palmer, 17.*
11. *When Sufficient to Show Note to be in Hands of Attorney for Collection.*—Evidence showing that the payee of a certain promissory note had died, and that such note had come into posses-

sion of the attorney for the administratrix of payee's estate; that such attorney treated with the maker in reference to the payment of the note, and advised with the son of the decedent in reference to a credit claimed; after which said attorney refused a tender made by maker, and finally with other attorneys brought suit on the note, is sufficient to show that the note was in the hands of said attorney for collection at the time the tender was made.

Rouyer, Admz., v. Miller, 519.

12. *Presumption*.—Where the undisputed testimony showed that a gas pipe was properly supported by chain or wires suspended from the joist of the building, evidence, after an explosion of such gas pipe, that no chain or wire was found, does not overcome the presumption that such pipe was properly supported at the time it was placed in the building.

Metzger v. Schultz, 454.

13. *Pleading and Proof*.—*Variance*.—Evidence that defendant's superintendent, several weeks after plaintiff was injured while in defendant's employ, made a special contract with plaintiff that in consideration of the latter's releasing any claim for damages, defendant would pay him his wages during the time he was disabled, does not sustain a complaint on common count for wages.

Louisville, etc., R. R. Co. v. Barnes, 312.

14. *Pleading and Proof*.—*Variance*.—Evidence of title in a corporation is not sufficient to sustain a claim of ownership by one who is a member of the corporation.

Dederick v. Brandt, 264.

EXECUTORS AND ADMINISTRATORS.

1. *Action to Compel Payment of Claim*.—*Change of Venue*.—An action to compel an administrator to pay a claim allowed against the estate, the amount of which by his final report he attempts to retain in payment for services rendered to the claimant, is not a civil action within the meaning of section 416, Burns' R. S. 1894, providing for a change of venue of certain civil actions.

Everroad, Admr., v. Lewis, 65.

2. *Special Administrator*.—*Statute Construed*.—A special administrator has no authority to enter into an agreed statement of facts with another person concerning the assets of the estate, and pay over money to such person upon an order of court made thereon, under section 2391, Burns' R. S. 1894 (2287, R. S. 1881), declaring the powers of such special administrator to be "to collect and preserve the property of the testator or intestate until demanded by an administrator duly authorized to administer the same, when such special letters shall be deemed revoked."

State, ex. rel., v. Tomlinson, 662.

EXPERT TESTIMONY—It is improper to ask an expert witness to give an opinion based upon his recollection of the testimony of another witness, see EVIDENCE, 10; *Bedford, etc., R. W. Co. v. Palmer, 17.*

EXPERT WITNESS—Competency of life insurance agent to testify as an expert as to the expectancy of life of a given person, see WITNESSES, 2; *Clark County Cement Co. v. Wright, Admr., 630.*

FEES—Collection of illegal fees by officers, see OFFICERS, 1; *Coleman v. Goben, 346.*

FELLOW SERVANT—Negligence of a conductor unloading freight, causing an injury to a brakeman assisting him is that of a fellow

servant, see NEGLIGENCE, 6; *Louisville, etc., R. W. Co. v. Southwick*, 486.

An employe whose duty it is to apply the power for drawing a car loaded with rock up an incline to the top of cement kilns, and another employe, whose duty it is to give the signal as to when to apply the power and to attend to the unloading of the car, are fellow servants, see MASTER AND SERVANT, 5; *Clark County Cement Co. v. Wright, Admr.*, 630.

FENCES—Obstruction of a public highway for a time with fences does not constitute an abandonment of the highway, see HIGHWAYS, 5; *Brown v. Hiatt*, 340.

FORFEITURE—When forfeiture of insurance policy for failure to pay premium is waived, see INSURANCE, 9; *Marshall Farmers' Home Fire Ins. Co. v. Liggett*, 598.

FRAUDULENT CONVEYANCE—Of real estate by intestate, see DECEDENT'S ESTATES; *Cray, Admr.*, v. *Wright*, 258.

GARNISHMENT—When an employe is estopped to question the regularity of proceedings by which his wages were garnished, see ESTOPPEL; *Baltimore, etc., R. R. Co. v. Manning*, 408.

GUARANTY—

Notice of Acceptance.—A bond executed by an employe conditioned that he pay over to his employer all sums of money received by him as such employe, signed by his guarantors or sureties and delivered by him to his employer as a part of the consummation of the contract, is an absolute continuing undertaking on the part of sureties or guarantors, and no notice of the acceptance thereof by the guarantee was necessary. *Bryant v. Stout*, 380.

HARMLESS ERROR—It is harmless error to sustain a demurrer to a good paragraph of answer when the same defense can be made under another paragraph, see PRACTICE, 3; *Brudi v. Trentman*, 512; *Kniss v. Holbrook*, 229.

Sustaining a demurrer to a bad pleading is harmless error, although the demurrer is insufficient to test the pleading, see PLEADING, 35; *Shepherd v. Marvel*, 417; *Bell v. Hiner*, 184.

Sustaining a demurrer to a paragraph of answer in an action for malicious prosecution, alleging the existence of probable cause, the nonexistence of malice, and the good faith of the action, is harmless error, as such facts are admissible under the general denial, see PRACTICE, 2; *Harlan v. Jones*, 398.

1. Overruling a demurrer to a bad paragraph of answer is harmless error where plaintiff's liability was determined by the findings of the court expressly made under the other paragraphs thereof.

J. F. Seiberling & Co. v. Newlon, 374.

2. *Evidence.*—*Opinion.*—The improper admission in evidence of an opinion of a witness on a matter to be determined by the jury, is harmless error where facts, conclusively showing the witness to have been right in his opinion, are proved by five other witnesses, and such facts are not contradicted.

Lake Erie, etc., R. R. Co. v. Rinker, 334.

3. *Pleading.—Counterclaim Containing Same Matters Pleaded in Answer.*—Where a defendant recovers on a counterclaim an amount in excess of plaintiff's demand the overruling of a demurrer to an answer setting up as a defense the same matters pleaded as a counterclaim, if erroneous, is harmless error.
Anglemyer v. Blackburn, 352.
4. *Overruling Demurrer.—Harmless Error.*—The overruling of a demurrer to a paragraph of answer by a special administrator, which fails to deny an allegation of the complaint that such administrator neglected and refused to receive certain assets of the estate which came to his knowledge, and suffered same to be converted by others, is harmless where it is found by the court that the decedent left no assets in the State.
State, ex rel., v. Tomlinson, 662.

HIGHWAYS—

1. *A Public Highway Annexed to a Town Becomes a Street.*—Land which has become a public highway before its annexation to a town by twenty years' continued use thereof by the public as such, as provided by section 6762, Burns' R. S. 1894, becomes one of the streets of the town after its annexation, although such section of the statutes does not apply to the public streets of a town.
Brown, Exr., v. Hines, 1.
2. *Vacation of.—Assessment of Damages.—Appeal.—Waiver.*—The failure of the petitioners for the vacation of a highway to move the board of commissioners to set aside the report of reviewers assessing damages, and appoint a new set of reviewers, does not waive the objections to the report and preclude the right of appeal to the circuit court.
Brandenburg v. Hittel, 224.
3. *Vacation of.—Abutting Landowner.—Remonstrance.—Statute Construed.*—The owner of land abutting on a highway at the point of intersection by another highway that is sought to be vacated, is not an owner of land through which the highway sought to be vacated passes, within the meaning of section 6746, Burns' R. S. 1894, giving right to remonstrate for damages.
Ib.
4. *Abandonment.*—The fact that part of a highway, as originally laid out, is not graded, graveled, and used as a passageway, does not constitute an abandonment thereof.
Brown v. Hiatt, 340.
5. *Obstruction Fences.—Abandonment.*—The obstruction with fences, of a public highway for a time by adjoining landowners does not constitute an abandonment of the highway.
Ib.

HUSBAND AND WIFE—

1. *Widow's Statutory Allowance.—Oral Agreement to Relinquish.*—A wife is not bound by an oral agreement to waive or relinquish her statutory allowance in the event she survives her husband, in consideration of the payment by him, in his lifetime, of money to or for the use of another.
Yelton, Admr., v. Kerns, 92.
2. *Husband's Liability for Necessaries for Wife.*—A husband who has abandoned his wife is liable for necessities furnished the wife after abandonment, when it is shown that her own means are inadequate for her support.
Stewart, Exr., v. Long, 164.
3. *Earnings of Wife.—Statute Construed.*—A married woman is, under section 6975, Burns' R. S. 1894 (5130, R. S. 1881), entitled to all of her earnings accruing from any services rendered by her for persons other than her husband or her family.
Arnold, Admr., v. Rifner, 442.

IMPEACHMENT—A witness having moved four months before giving his testimony, may be impeached by showing his reputation

in the neighborhood where he formerly lived, see WITNESS, 4; *Gemmill v. State, ex rel.*, 154.

IMPLIED TRUST—The acceptance of a deed by a surety to indemnify him against loss by reason of his surety raises an implied trust in favor of his co-sureties in such property, see PRINCIPAL AND SURETY, 1; *Kelso v. Kelso*, 615.

INDICTMENT—Recognizance bond rendered void by quashing, see BAIL; *State v. Clerk*, 137.

INFANT—Is competent to make a contract for the establishment of the family relation between himself and one not related to him, see CONTRACTS, 2; *Purviance, Admr., v. Shultz*, 94.

INSTRUCTIONS—As to the interpretation of a contract, see CONTRACTS, 8; *Consolidated Coal and Lime Co. v. Mercer*, 504.

When will be presumed to have not been tendered in time, see APPEAL AND ERROR, 18, 20; *Lofland v. Goben*, 67.

When will not be reviewed on appeal, see APPEAL AND ERROR, 19; *Geiger, Tr., v. Huenneke*, 326.

1. *Incomplete*.—The proper remedy for an alleged omission in giving an instruction, correct so far as it goes, is not by exception but by a request for an instruction supplying the omission.

Summit Coal Co. v. Shaw, 9.

2. *Will be Considered as a Whole*.—Where the instructions as a whole state the law correctly, it is not reversible error that some particular instruction or part of an instruction is incomplete or inaccurate.

Lofland v. Goben, 67.

3. It is error to instruct the jury, in an action to recover from an estate for work and labor performed for decedent, that if decedent kept the plaintiff, who was a minor and not related by blood or marriage, at her home until her death, and received her work and labor, and furnished her with food, raiment and shelter, the family relationship is not presumed to exist between them, as there is no presumption of law, and the court should never instruct that a presumption which is purely one of fact exists or does not exist.

Purviance, Admr., v. Shultz, 94.

4. *Contributory Negligence*.—On the issue of contributory negligence, in an action for personal injuries, it is error to instruct the jury that "contributory negligence on the part of the servant would not prevent him from recovering damages which he might otherwise be entitled to if by the exercise of ordinary care on the part of the master the consequences of such servant's negligence might have been avoided," when not limited to a case where the master's negligence was committed after he was aware of servant's danger.

Summit Coal Co. v. Shaw, 9.

INSURANCE—When copy of policy need not be set out in complaint, see PLEADING, 20; *National Fire Ins. Co. v. Strebe*, 110.

1. *Action on Policy.—Complaint*.—A complaint in an action on an insurance policy is not bad for a failure to directly aver the consideration and time of expiration of the policy, where the policy itself is made a proper exhibit.

Aetna Ins. Co. v. Strout, 160.

2. *Construction of Policy.—Interest of Assured*.—Where an insurance policy provides that it shall be void if the interest of the assured be any other than the entire, unconditional, and sole owner-

ship of the property, unless expressed in the policy, such policy is void where the insured owns only an undivided one-half interest, and no statement of such fact is contained in the policy.

Sisk v. Citizens' Ins. Co., 565.

8. *Construction of Policy.—Payment of Premium.*—A provision in an insurance policy that where a note is given for the premium and the same is not paid within thirty days after it becomes due the policy shall be void until the note is paid is not applicable where no note is given and the insured is given a reasonable time in which to pay the premium.
Ohio Farmers' Ins. Co. v. Stowman, 205.
4. *Construction of Policy.*—A policy of insurance covering a certain specified building, a boiler and engine "while contained in above described building," and certain machinery, tools, and patterns, covers the patterns insured even though they were not in the building at the time they were burned. *Aetna Ins. Co. v. Strout*, 160.
5. *Construction of Policy.*—Where an insurance policy is so drawn as to be fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the insured. *Ib.*
6. *Policy.—Incontestable Clause.*—A provision on the back of a certificate of insurance that it shall be incontestable "after one year from the date as provided in the by-laws," does not render it incontestable upon the death of the insured seven years after its date, where the by-laws provide that the certificate shall be incontestable in case of all deaths occurring "within three years" from the date of the certificate.

People's Mut. Ben. Soc. v. Templeton, 126.

7. *Life Insurance.—Insurable Interest.*—The legal liability of a mother to support her son unless he is unable to earn a livelihood, and she is able to provide for his support, created in behalf of the county or town by the laws of Illinois, does not give a son an insurable interest in the life of his mother, where the latter is seventy-six years old when the policy on her life is issued, and there is nothing to justify an inference that she had or would ever have sufficient ability to support him. *Ib.*
8. *Failure to Pay Premium at Time Fixed.*—The failure of assured to pay the premium on an insurance policy within a definite and fixed time does not work a forfeiture of the policy in the absence of any stipulation to that effect in the policy.
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9. *Forfeiture.—Waiver of by Accepting Delinquent Assessments After Loss.—Mutual Insurance Company.*—Where a director of a mutual insurance company, who was acting as collector, called upon assured the next morning after a fire and collected two delinquent assessments on a policy of insurance covering such loss, having knowledge of such loss, and the company retained the money so collected, a forfeiture of such policy on account of such delinquency is thereby waived.
Marshall Farmers' Home Fire Ins. Co. v. Liggett, 538.
10. *Failure of Insured to Protect Property from Damage After Fire.*—An insured cannot recover for damages to his property, resulting from his failure to properly care for the same after it had been wet from the water used in extinguishing a fire in the building where the property was situate, where the policy provides that the best endeavor of the insured shall be used in saving and protecting the property at and after the fire, and in case of failure to do so the company shall not be liable for damages resulting from such failure.
Sisk v. Citizens' Ins. Co. 565.

11. *Parol Evidence*.—In an action on a fire insurance policy, parol evidence is admissible to identify the property covered.
Aetna Ins. Co. v. Strout, 160.
12. *Evidence*.—In an action on an insurance policy, where a greater loss is proved than was at first claimed, the insured may explain the discrepancy by showing that his first claim was made through a misunderstanding as to the construction of the policy. *Ib.*
13. *Waiver—Presumption*.—The law will not presume that an insurance company has waived a provision intended for its protection.
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14. *Proof of Loss—Waiver*.—A denial by an insurance company of all liability on an insurance policy, operates as a waiver of the requirement for proof of loss.
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15. *Assignment of Life Insurance Policy by Parol*.—A parol assignment of a life insurance policy, payable to the estate of the assured, made by the assured to his wife, is valid, where the policy does not declare an assignment without the consent of the company void.
State, ex rel., v. Tomlinson, 662.
16. *Equitable Assignment of Life Insurance Policy*.—An equitable assignment of a life insurance policy payable to the estate of the assured is effected where the insured instructed the general agent of the company, by letter, to have such policy made payable to his wife, although the change is not made until after his death. *Ib.*
17. *Assignment of Life Insurance Policy to Wife*.—An assignment of a life insurance policy, which was payable to the estate of insured, by the insured to his wife, is valid as against his creditors, except as to the amount of the premiums paid thereon, where it was taken out only two years before the transfer thereof, and the death of the insured. *Ib.*

INTERROGATORIES TO JURY—When ruling on may be assigned as error on appeal, see **APPEAL AND ERROR**, 17; *National Fire Ins. Co. v. Strebe*, 110.

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INTOXICATING LIQUORS—

1. *Violation of Law—Sufficiency of Affidavit*.—An affidavit charging a violation of section 4 of the Act of March 11, 1895, which requires that any room where intoxicating liquors are sold shall be situated upon the ground floor or basement of the building and fronting on the street or highway, alleging that defendant was the proprietor of the room where the liquors were sold and that such room did not front on the street or highway, is sufficient without directly averring that defendant or his agents sold liquors in such room.
State v. Wickwire, 348.
2. *Damages Resulting from Illegal Sale to Minor—Liability of Bondsmen*.—The liability of the bondsmen of a saloonkeeper for damages resulting from illegal sales of liquor to a minor is not affected by the fact that the sales were made by the bartender and not by the saloonkeeper in person. *Reath v. State, ex rel.*, 146.
3. *Damages Resulting from Illegal Sales to Minor—Statute Construed*.—Under section 7288, Burns' R. S. 1894, providing that saloonkeepers shall be liable upon their bonds "to any person

ship of the property, unless expressed in the policy, such policy is void where the insured owns only an undivided one-half interest, and no statement of such fact is contained in the policy.

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3. *Damages Resulting from Illegal Sales to Minor—Statute Construed*.—Under section 7288, Burns' R. S. 1894, providing that saloonkeepers shall be liable upon their bonds "to any person

who shall sustain any injury or damage to his person or property, or means of support, on account of the use of such liquors, so sold," the loss of services of a minor son who contributed by his earnings to the support of his father's family is a damage within the meaning of the statute, although the earnings and income of the father is sufficient to keep the family from becoming dependent. *Ib.*

JUDGMENT—Objections to form of must be made in trial court, see APPEAL AND ERROR, 5; *Dederick v. Brandt*, 264.

1. *Complaint to Set Aside Default.*—*Sheriff's Return Not Conclusive.*—In a proceeding under section 399, Burns' R. S. 1894, to set aside a default and to be relieved from a judgment, the plaintiff may show that the summons was not in fact served upon her, and that she had no notice of the pendency of the action against her, notwithstanding the fact that the sheriff's return shows service by copy at her residence. *Shepherd v. Marvel*, 417.
2. *Special Finding.*—Failure to enter judgment on a special finding at the term of court the finding was made and filed, or any order continuing the cause, did not divest the court of jurisdiction thereof. *J. F. Seiberling & Co. v. Newton*, 374.
3. *Relief From Judgment Taken by Default, After Sale.*—The mere fact that a sale had been made under a judgment and the judgment satisfied of record, does not deprive one against whom the judgment was taken, of relief under section 399, Burns' R. S. 1894.

Shepherd v. Marvel, 417.

JUDICIAL NOTICE—Courts know judicially that natural gas is highly explosive, see EVIDENCE, 9; *Alexandria Mining and Exploring Co. v. Irish*, Admr., 534.

JUDICIAL SALE—As to relief after sale from judgment taken by default, see JUDGMENT, 3; *Shepherd v. Marvel*, 417.

A purchaser at a sale under a junior lien, the holder of which was not made a party in an action to foreclose a senior lien does not acquire title superior to the senior lienholder, unless the senior lienholder was made a party, see LIENS, 4; *Williams v. Hanly*, 464.

JURISDICTION—The Appellate Court has not jurisdiction of an appeal from a proceeding to be relieved from a default in an action to quiet title to real estate, see APPEAL AND ERROR, 1; *Moore v. Horner*, 694.

In an action against a foreign insurance company, brought in a different county than the one in which plaintiff and the agent issuing the policy resided, the question of jurisdiction of the court can only be alleged by special plea alleging such facts as are necessary to raise that issue, see PLEADING, 40; *Ohio Farmers' Ins. Co. v. Stouman*, 205.

LABOR LIENS—Are superior to a chattel mortgage where the property has passed into the hands of an assignee or receiver, see LIENS, 1, 2, 8; *Bell v. Hiner*, 184.

LANDLORD AND TENANT—Sufficiency of in an action for damages by lessee against lessor for failure to deliver possession, see DAMAGES, 3; *Loufer v. Stottlemeyer*, 221.

1. *Construction of Lease*.—A lease for one year with the agreement that if lessee should prove to be a satisfactory tenant and should do what was right the lessor would again rent the premises to him for another year, cannot be construed as a leasing of the premises for an additional year. *Mullen v. Pugh, 337.*
2. *Ejectment.—Equitable Lien for Improvement*.—Under a lease for one year which stipulates that should the lessee prove satisfactory as a tenant and do what was right the lessor would rent him the premises for another year, and which stipulates further that lessee might build a house on the premises, for which lessor would pay lessee whenever his tenancy should cease, the lessee has an equitable lien upon the real estate for the value of a house built, and a court of equity will protect him in possession of the real estate until he is paid for the value of the improvement so made. *Ib.*

LEASE—As to construction of, see **LANDLORD AND TENANT, 1; Mullen v. Pugh, 337.**

LIENS—Tenant may have equitable lien for improvements, see **LANDLORD AND TENANT, 2; Ib.**

1. *Superior to a Prior Chattel Mortgage.—Statute Construed*.—Under section 7051, Burns' R. S. 1894 (5206, R. S. 1881), providing that when the business of any person shall be suspended by the action of creditors, the debts owing to laborers, not exceeding \$50.00 to each laborer, for work performed within the next preceding six months, shall be preferred and first paid in full, a transfer by an employer of all his property to a chattel mortgagee creates a superior lien in favor of such laborers.—*Reinhard and Ross, JJ. Dissenting. Bell v. Hiner, 184.*
2. *Statute Liberally Construed*.—Statutes providing that laborers shall be preferred creditors when the business of their employer shall be suspended by the action of creditors, are remedial in their nature, and are liberally construed. *Ib.*
3. *Statutes*.—The Act of March 8, 1885, which makes no provision for, and does not cover, the subject of labor liens except where the property has passed into the hands of an assignee or receiver does not cover the whole subject-matter and repeal by implication the Act of 1879 (section 5206, R. S. 1881). *Ib.*
4. *Foreclosure of Senior Lien Without Making Junior Lienholder a Party*.—A senior lienholder may foreclose a lien without making a junior lienholder a party and still retain the priority of his lien, and the subsequent sales thereunder do not render the title of the purchaser at such sale inferior to the title acquired by another at a sale upon the decree of foreclosure of a junior lien, unless the holder of the superior lien is made a party to the foreclosure of the junior lien and fails to set up the priority of his own lien, or is barred in some way by the judgment of the court. *Williams v. Hanly, 464.*
5. *Foreclosure of.—Priority.—Estoppel*.—A decree in a proceeding to foreclose a drainage lien is not conclusive against a defendant who is the holder of a prior lien for taxes, and was made a party to the foreclosure proceedings, and defaulted, where the complaint in such foreclosure proceedings does not state facts, which, if admitted, would subject the lien of the defendant to the drainage lien. *Allen v. Rice, 572.*

LIFE INSURANCE—See **INSURANCE.**

LIMITATION OF ACTIONS—Parol promise to pay debt barred by statute of limitations, see EVIDENCE, 2; *Brudi v. Trentman*, 512.

1. *Agreement as to When Claim is to be Paid.*—Where it is agreed that a claim for services is to be paid at the time of settlement of a certain estate, the statute of limitations does not begin to run against an action on the claim until such estate is settled.

Simons, Admr., v. Beaver, 492.

2. *Part Payment of Debt.—Implied Promise to Pay Balance.*—The voluntary part payment of a debt, made as such, is an acknowledgment of an existing obligation, and from such acknowledgment a promise to pay the balance may be implied.

Brudi v. Trentman, 512.

3. *Proof of Part Payment.—Revival of Action.—Statute Construed.*—Part payment of a debt before it is barred by the statute of limitations may be proved by parol and a new promise inferred therefrom, as the statute, section 302, Burns' R. S. 1894, requiring a written acknowledgment or new promise to revive a debt applies only where the debt is barred. *Ib.*

LONGHAND MANUSCRIPT—How made part of record, see APPEAL AND ERROR, 16; *Kelso v. Kelso*, 615; *Pittsburgh, etc., R. W. Co. v. Cope*, 579.

MALICIOUS PROSECUTION—

When Action For Will Lie.—Search Warrant.—Procuring a search warrant to be issued may be made the foundation of an action for malicious prosecution, notwithstanding the affidavit on which such warrant was issued does not charge a crime.

Harlan v. Jones, 398.

MANDAMUS—To require judge to sign bill of exceptions, see BILL OF EXCEPTIONS, 2; *State, ex rel., v. White, Special Judge*, 260.

MASTER AND SERVANT—When relation of master and servant does not exist, see RAILROADS, 11; *Stalcup v. Louisville, etc., R. W. Co.* 584.

1. *Safe Place to Work Must be Provided.—Latent Defects.*—A servant has a right to assume, without looking for latent defects, that the master has done his duty in providing safe premises or working places for his servants, unless he has knowledge of the defects or can obtain such knowledge by the use of ordinary care. *Summit Coal Co. v. Shaw*, 9.

2. *Duty of Master to Furnish Safe Working Place.*—It is the duty of the master to furnish his employes with reasonably safe working places and with reasonably safe appliances with which to work, and to use every reasonable care to keep such places and appliances in such condition.

Clark County Cement Co. v. Wright, Admr., 630.

3. *Knowledge of Defects.—Assumption of Risk.—Burden of Proof.*—In an action for the death of an employe the burden is upon the plaintiff to show that his intestate had no knowledge of any defect in the machinery or appliances with which he worked; and that he had not assumed the risk of the danger. *Ib.*

4. *Negligence.*—An employe is not, as a matter of law, negligent in obeying his employer's order to perform a different kind of work from that which he was employed to perform with knowledge that it was more dangerous. *Ib.*

5. *Fellow Servant*.—An employe, whose duty it is to apply the power for drawing a car loaded with rock up an incline to the top of cement kilns, and another employe, whose duty it is to give the signal as to when to apply the power and to attend to the unloading of the car, are fellow servants. *Ib.*

MECHANIC'S LIEN—

1. *How Obtained*.—A mechanic's lien cannot be acquired by intention, implication, inference, or contract. It can only be acquired by giving the notice prescribed by the statute after the labor has been performed or material actually or constructively furnished. *Barnett v. Stevens, 420.*
2. *For Material Specially Designed.—When Waived*.—A mechanic's lien which has attached to a building on account of materials which have been specially designed and prepared for the repair of the building, but which have not been actually placed therein, is waived where the materialman, after the repudiation of the contract by the owner, and after the lien has been filed, asserts title to the materials, furnishes the same under a new and independent contract with the purchaser of the premises, and it is not revived by a judgment obtained by the original owner declaring the conveyance fraudulent. *Ib.*

MORTGAGES—See CHATTEL MORTGAGES.

1. *Rights of Junior Mortgagee*.—A mortgagee of a stock of goods who takes possession of and sells the same, and receives therefor more than enough to pay the amount of the mortgage and expenses necessarily incurred, must account for the excess to a junior mortgagee. *Stewart, Exx., v. Long, 164.*
2. *Conversion by Senior Mortgagee.—Right of Junior Mortgagee to Elect Remedy*.—Where a senior mortgagee, upon a breach of a condition of his mortgage has taken possession of a stock of goods and transferred the same to a third party, who has exclusive possession, and is selling the goods and appropriating the goods to his own use, a junior mortgagee has the right to elect whether he would pursue the goods by foreclosure or sue for conversion. *Ib.*
3. *Deed Absolute in Form*.—A conveyance by deed absolute in form, given to indemnify the grantee against any loss as surety, is nothing more than a mortgage. *Kelso v. Kelso, 615.*
4. *Deed.—Evidence*.—A deed absolute on its face may be shown by parol to have been intended as a mortgage. *Ib.*

MUNICIPAL CORPORATIONS—Sufficiency of complaint in an action on account against a town, see PLEADING, 14; *Town of Petersburg v. Petersburg Electric Light Co., 151.*

1. *Streets Must be Kept in Reasonably Safe Condition*.—It is the duty of a city or town to keep its streets in a reasonably safe condition for travel. *Town of Salem v. Walker, 687.*
2. *Failure to Keep Street in Safe Condition.—Duty of Traveler*.—The failure of a town to keep its streets in a reasonably safe condition will not excuse the traveler from the use of ordinary care. *Ib.*
3. *Rights of Traveler Who has Knowledge of Defect in Street*.—One who has knowledge that a street in a city is out of repair, is not, therefore, bound to forego travel thereon; but the care on the part of the traveler in such case must be in proportion to the danger that might be encountered by reason of the defect or obstruction. *Ib.*

NATURAL GAS—As to defective gas pipes, see NEGLIGENCE, 1; *Metzger v. Shultz*, 454.

As to sufficiency of complaint in an action for damages for death caused by explosion, see COMPLAINT, 1; *Alexandria Mining and Exploring Co. v. Irish*, Admr., 534.

When a landlord is not liable for an injury resulting from an explosion of natural gas, see NEGLIGENCE, 1; *Metzger v. Shultz*, 454.

Notice to company of unsafe condition of pipes, see EVIDENCE, 8; *Alexandria Mining and Exploring Co. v. Irish*, Admr., 534.

As to evidence of defective pipes in an action for damages on account of explosion, see EVIDENCE, 6, 7, 8; *Ib.*

1. *Duty of Natural Gas Companies*.—It is the duty of a natural gas company to so operate its pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. *Ib.*

2. *Failure to Test Pipes.—Statute Construed*.—Under the provisions of section 7507, Burns' R. S. 1894, *et seq.*, that natural gas companies shall conduct gas only through sound wrought, or cast iron pipes and casings, tested to a pressure of at least 400 pounds to the square inch, and that such companies shall not convey natural gas through such pipes and casings at a pressure exceeding 300 pounds per square inch, the failure of such company to test its pipes to a pressure of at least 800 pounds is in violation of said statute and such company is thereby guilty of negligence for which it is answerable in damages for all resulting injuries. *Ib.*

NEGLECTANCE—See DAMAGES; CONTRIBUTORY NEGLIGENCE.

Necessary averments as to freedom from fault, see COMPLAINT, 2; *Alexandria Mining and Exploring Co. v. Irish*, Admr., 534.

May be the proximate cause of an injury although not the immediate cause, see PROXIMATE CAUSE, 2; *Ib.*

Failure to operate safety gates at railway crossing as required by a city ordinance amounts to negligence, see RAILROADS, 5; *Indianapolis Union R. W. Co. v. Neubaucher*, 21.

A sleeping-car company cannot relieve itself from liability for the loss by its negligence of the effects of a passenger by posting in the car a notice by which it attempts to relieve itself of such liability, see SLEEPING-CAR COMPANIES, 3; *Voss v. Wagner Palace Car Co.*, 271.

A natural gas company is guilty of negligence for which it is answerable in damages for failure to test its pipes to a pressure of at least 800 pounds per square inch, see NATURAL GAS, 3; *Alexandria Mining and Exploring Co. v. Irish*, Admr., 534.

An employe is not as a matter of law negligent in obeying his employer's order to do work outside of his usual employment, see MASTER AND SERVANT, 4; *Clark County Cement Co. v. Wright*, Admr., 630.

1. *Gas Explosion.—Defective Gas Pipes.—Knowledge of Owner*.—A landlord is not liable for an injury to an employe of her tenant resulting from an explosion of gas, caused by defective plumbing done by a former tenant of the building, who employed a competent

plumber to do the work, in which the defects were not apparent and of which the landlord had no actual knowledge.

Metzger v. Schultz, 454.

2. *Approaching Railroad Crossing. — Contributory Negligence.*—One riding in a vehicle as the guest of another who neither looks nor listens on approaching a railroad crossing with which he is familiar, although he knows that a train has arrived at the station near the crossing, and has an unobstructed view of a sidetrack for a distance of 80 feet when 20 feet from the track, and who gives no notice to the driver, is guilty of such contributory negligence as will prevent a recovery for an injury caused by a train backing over the crossing on such sidetrack.

Lake Shore, etc., R. W. Co. v. Boyts, 640.

3. *Contributory Negligence. — Approaching Railroad Crossing.*—Where one is riding in a vehicle as the guest of the driver, it is no less his duty than it is the duty of the driver when approaching a railroad crossing to look and listen to learn of danger and avoid it, if practicable. *Ib.*

4. *Railroads.*—It is negligence to back an engine and cars across a street of a town at the rate of eight miles an hour, with no person on the car and without sounding the whistle or ringing the bell, and without giving any warning of its approach. *Ib.*

5. *Imputed Negligence.*—Where one, as a guest, accepts an invitation to ride in the vehicle of another, without any authority to control or direct the movements of the driver thereof, or without any reason to doubt that the driver is skillful and competent, the negligence of the owner or driver will not be imputed to the guest so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury. *Ib.*

6. *Fellow Servant.*—The negligence of a conductor of a freight train while engaged in unloading freight, causing an injury to a brakeman assisting him, is that of a fellow servant.

Louisville, etc., R. W. Co. v. Southwick, 486.

7. *When a Question of Law. — Facts Undisputed.*—In an action for damages for personal injuries, where the facts as to the manner in which the injury occurred are undisputed, it is the province of the court to determine whether or not the facts amount to negligence. *Town of Salem v. Walker, 687.*

NEW TRIAL—

Joint Motion For.—A joint motion by several co-parties for a new trial must be well taken as to all the parties joining in it or there will be no error in overruling it. *Leavell v. State, ex rel., 72.*

NOTICE—Of acceptance of guaranty by guarantee, see **GUARANTY**; *Bryant v. Stout, 380.*

When notice provided for in contract of warranty is waived, see **SALES, 2**; *J. F. Seiberling Co. v. Newlon, 374.*

When Written Notice is Waived.—In an action upon a contract which provides that no right of action shall accrue until the opposite party has had notice in writing, such notice must be given unless waived, before a right of action will accrue; but if a verbal notice is given, accepted, and acted upon the giving of the written notice is waived. *Huber Mfg. Co. v. Busey, 410.*

OFFICERS—As to action on official bond, see **BONDS**; *Leavell v. State, ex rel., 72.*

1. *Collecting Illegal Fees.—Penalty.—Statute Construed.*—A borrower from the school fund, having failed to pay the interest on such loan for a number of years, paid to the county treasurer, on demand of the auditor, the two per cent. penalty required by section 5815, Burns' R. S. 1894, and the auditor issued warrants drawn upon the county revenue fund to the county attorney for services as attorney rendered in and about the collection of said penalty. *Held*, that no action would lie against the officers for the collection of illegal fees under section 6549, Burns' R. S. 1894.

Coleman v. Goben, 346.

2. *County Auditor.—Contract for Election Supplies.—Liability of County.*—A county auditor has no authority to bind the county by an order for poll books, tally sheets, and other election supplies to be furnished eighteen months in the future and for an election to be held more than eleven months after the expiration of his term of office.

Morrison & Co. v. Board, etc., 317.

3. *Bonds.—Water Works Superintendent.—Liability of Sureties on Bond of.*—The sureties on the bond of a water works superintendent of a town are not liable for his default in failing to account for water rents collected by him, in the absence of any resolution or ordinance fixing the duties of such superintendent, or any condition in the bond sued upon authorizing him to collect water rents, although his contract of employment provides for such collection, as the collection of water rents forms no part of the duties of superintendent in the ordinary meaning of the word.

Town of Salem v. McClintock, 656.

ORDINANCES—Sufficiency of complaint in action for violation of, see PLEADING, 12, 13; *Lake Erie, etc., R. R. Co. v. City of Noblesville*, 20.

PARENT AND CHILD—

Excessive Punishment of Child.—Assault and Battery.—A parent has the right to administer proper and reasonable chastisement to his child, without being guilty of assault and battery, but excessive, unreasonable, or cruel punishment is unlawful. Whether the punishment inflicted is excessive or cruel is a question for the jury.

Hornbeck v. State, 484.

PARTIES—Defect of is not raised by general demurrer, see PLEADING, 33; *Loufer v. Stottlemyer*, 221.

Defect of waived on failure to demur on that ground, see PLEADING, 34; *Ib.*

As to foreclosure of lien by senior lienholder without making junior lienholder a party, see LIENS, 4; *Williams v. Hanly*, 464.

In an action on lost note by assignee, the indorser a proper party defendant, see PLEADING, 10; *Clark v. Trueblood*, 93.

A joint motion for new trial must be well taken as to all the parties joining in it or there will be no error in overruling it, see NEW TRIAL; *Leavell v. State, ex rel.*, 72.

When Party in Interest May be Admitted as Defendant.—Action on Insurance Policy.—Statute Construed.—A stock holder in a corporation is, under section 274, Burns' R. S. 1894 (273, R. S. 1881), entitled to be admitted as a party defendant in an action by the mortgagee of the corporation on an insurance policy on the corporate property, where the policy was by mistake of the insur-

ance company's agent and without the knowledge and consent of such stockholder made payable to the mortgagee instead of such stockholder who paid for the insurance.

Kirshbaum v. Hanover Fire Ins. Co., 606.

PATENTS—As to note given for patent right, see **BILLS AND NOTES**, 1. 2; *Lofland v. Goben*, 67; *Kniss v. Holbrook*, 229.

1. *Sale of Patent Right*.—The sale of an unexclusive right to utilize an invention is not a sale of a patent right within the meaning of section 8130, Burns' R. S. 1894.

Eclipse Wind Engine Co. v. Zimmerman Mfg. Co., 496.

2. *Sale of Patent Right*.—*Statute Construed*.—Appellant was the owner of a certain patent right which it claimed was infringed by appellee through using certain improvements upon windmills which it made and sold. To release all liability and to provide against futuro liabilities, the parties entered into a written agreement by the terms of which in consideration of \$2,000, for which notes were given, appellant released appellee from all damages accrued and "granted and licensed" the appellee company to continue the manufacture of the windmills as theretofore with the patented improvement. *Held*, in an action on the notes, that the notes were not given for a patent right within the meaning of section 8130, Burns' R. S. 1894, requiring that notes given for a patent right shall contain the words "given for a patent right." *Ib.*

PLEADING—See **COMPLAINT**; **ANSWER**.

Counterclaim containing same matter as pleaded in answer, see **HARMLESS ERROR**, 8; *Aglemeyer v. Blackburn*, 352.

An order overruling a demurrer to a bad answer will not be disturbed on appeal where the complaint is also bad, see **APPEAL AND ERROR**, 3; *Grace v. Cox*, 150.

As to variance between pleading and proof, see **EVIDENCE**, 13, 14; *Louisville, etc., R. R. Co. v. Barnes*, 312; *Dederick v. Brandt*, 264; **APPEAL AND ERROR**, 4; *Clark v. Trueblood*, 93.

1. *Action on Official Bond*.—*Complaint*.—A complaint in an action under Act of June 5, 1883, to recover from the clerk of the court and the sureties on his official bond the amount paid by the State, as fees and charges, to the Attorney-General, need not expressly aver that the money was withheld by the clerk for twelve months before its collection by the Attorney-General, as such fact will be presumed. *Leavell v. State, ex rel.*, 72.
2. *Complaint*.—*Contract*.—*Consideration*.—A complaint, based upon an oral contract which does not express or import a consideration, should specially allege what the consideration was. *Louisville, etc., R. R. Co. v. Barnes*, 312.
3. *Complaint*.—*Conversion*.—In an action for conversion of a stock of goods on which plaintiff held a mortgage as a security for a note, the note and mortgage need not be made part of the complaint. *Stewart, Exx., v. Long*, 164.
4. *Complaint*.—*Conversion*.—*Demand*.—A complaint alleging actual conversion need not aver demand before suit. *Ib.*
5. *Complaint*.—*Damages for Personal Injuries*.—*Contributory Negligence*.—A general averment in a complaint in an action for personal injuries that plaintiff was free from contributory negligence is sufficient unless the facts pleaded in detail show that he was guilty of negligence notwithstanding such general averment. *Summit Coal Co. v. Shaw*, 9.

6. *Complaint.—Master and Servant.*—A complaint in an action for damages against an employer for negligently causing the death of an employe, alleging that the work at which decedent was engaged by the employer's orders when killed was entirely different from the work he was employed to do, and was more dangerous and hazardous, and had to be performed with different workmen, and with appliances and in a place different from those of the work he was employed to do, sufficiently shows that the decedent was killed while performing work which he was not originally employed to do. *Clark County Cement Co. v. Wright, Admr., 630.*
7. *Complaint.—Negligence.*—In an action for damages against an employer for negligently causing the death of an employe, a complaint containing an averment of negligence on the part of the defendant, and an averment of the want of contributory negligence on the part of the plaintiff's intestate is sufficient against a demurrer, unless the facts specifically stated in the complaint show the contrary. *Ib.*
8. *Action on Lost Note.—Complaint.*—In an action on a lost note it is not necessary to the sufficiency of the complaint that the loss of the note should be shown by affidavit, nor is it necessary to aver a search for the note. *Clark v. Trueblood, 98.*
9. *Action on Lost Note.—Variance Between Complaint and Exhibit.*—In an action on a lost note the variance between the exhibit filed as a substantial copy from the note described in the body of the complaint as to the time of maturity, rate of interest, and attorneys' fees, does not make the complaint bad on demurrer. *Ib.*
10. *Action on Lost Note by Assignee, Endorser a Proper Party Defendant.*—In an action on a lost note brought by the assignee against the maker, the endorser is a proper party defendant, where it is averred that he claims the ownership of the note. *Ib.*
11. *Action by Assignee of Note.—Complaint.*—In an action upon a promissory note, brought by assignee against the maker, the complaint should aver the assignment, but it is not necessary to file with complaint a copy of the endorsement. *Ib.*
12. *Complaint.—Violation of City Ordinance.—Penalty.*—In a suit to recover the penalty for a violation of a city ordinance, so much of the city ordinance as relates to the offense must be referred to in the complaint by number of the section or sections and the date of adoption. *Lake Erie, etc., R. R. Co. v. City of Noblesville, 20.*
13. *Evidence.—City Ordinance.*—In a suit to recover the penalty for a violation of a city ordinance, the city is not required to aver or prove publication of the ordinance, unless this fact be denied by affidavit. *Ib.*
14. *Action Against a Town.—Complaint.*—A complaint against a town alleging that pursuant to a contract the plaintiff furnished such town with electric lights for which said town owed plaintiff a certain sum which was due and unpaid, is sufficient to withstand a demurrer without alleging that the amount due under the contract had been allowed by the town board; that there was funds in the hands of the town treasurer with which to pay the claim; or, that said town could have paid said indebtedness at any time prior to the commencement of the action. *Town of Petersburg v. Petersburg Electric, etc., Co., 151.*
15. *Complaint.—Allegation of Record of Chattel Mortgage in County Where Mortgagor Resides.*—An allegation in a complaint that a chattel mortgage was recorded in the county where the mort-

- gagors were engaged in a general mercantile business is not equivalent to an allegation that the mortgage was recorded in the county in which the mortgagors reside as required by section 6638, Burns' R. S. 1894. *Morris v. Ellis*, 679.
16. *Complaint.—Master and Servant.*—The complaint in an action for the death of an employe need not allege want of knowledge of the danger on the part of the decedent, where he had been ordered to work out of the line of or away from the place of the work he was engaged to perform.
Clark County Cement Co. v. Wright, Admr., 630.
17. *Damages Caused by Fire.—Complaint.*—In an action against a railroad company for damages to real estate caused by fire set out on its right of way, and permitted to escape to said land, it is not necessary to aver what engine started the fire.
Baltimore, etc., R. R. Co. v. Countryman, Assignee, 139.
18. *Damages Caused by Fire Escaping from Railroad Right of Way.—Complaint.*—Where in an action against a railroad company for damages caused by fire escaping from the company's right of way, the complaint clearly proceeds upon the theory that the claim first accrued to the plaintiff's assignor and passed to plaintiff, by assignment, the unnecessary statement at the conclusion of the pleading, that thereby the "plaintiff has been damaged," cannot be given such force as to require the complaint to be construed as counting upon an injury to the land while its title was in the assignee. *Ib.*
19. *Complaint.—Stock Killed on Railroad.*—A complaint for damages against a railroad company for the unlawful killing of an animal, based upon sections 5312-5318, Burns' R. S. 1894, sufficiently avers that the animal was killed in the county where the suit was brought, where it is alleged that the defendant operated a railroad between two certain municipal corporations within the county, and that said animal was on said company's right of way, having entered at a point where said right of way was insecurely fenced, etc. *Lake Erie, etc., R. R. Co. v. Rinker*, 334.
20. *Action on Insurance Policy.—Complaint.*—In an action on an insurance policy an allegation that the policy was in the possession of the company, and that its agent refused to deliver it upon demand, saying that he had sent it to the company, and that the company was not liable and would never pay the holder anything, is a sufficient excuse for not setting out a copy of the policy, and for not averring that proof of loss had been made as required by the terms of the policy. *National Fire Ins. Co. v. Strebe*, 110.
21. *Action on Insurance Policy.—Complaint.*—In an action on an insurance policy a complaint alleging that the policy was executed and delivered to plaintiff in consideration of a specified amount as a premium, is sufficient without alleging a payment or an agreement to pay anything, as it is immaterial whether the premium was paid in cash or whether a credit was given for the same.
Ohio Farmers' Ins. Co. v. Stowman, 205.
22. *Complaint.—Receiver.—Statutes Construed.*—The omission from the complaint of the necessary averment in an action by a receiver, that he has been given leave of court to bring the action, is not aided upon appeal by sections 348, 401, and 670, Burns' R. S. 1894, providing that no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appears from the whole record that the merits of the case have been fairly determined, and that technical defects, or defects in form shall not be ground for reversal.
Rhodes v. Hilligoss, Rec., 478.

23. *Complaint.—Construction of Language Employed in a Pleading.*—It is the duty of the court in construing a pleading and determining its sufficiency to give the language employed a reasonable intendment, but when the words used in a complaint wholly fail to state a material fact essential to a recovery it must be resolved against the pleader. *Morris v. Ellis*, 679.
24. *Complaint by Receiver.—Sufficiency of.*—The complaint, in a suit commenced by a receiver upon an obligation due a corporation for which he is acting, is not sufficient to withstand a demurrer, which does not allege that leave of court to institute and prosecute the action was obtained before suit was brought. *Rhodes v. Hilligoss, Rec.*, 478.
25. *Complaint.—Receiver.*—The necessary averment in an action by a receiver that he has been given leave by the court to bring the action is not supplied by the averments of the complaint that he has been appointed as receiver and has qualified and entered upon his duties as such, "and accordingly he brings this suit." *Ib.*
26. *Answer.—Insurance.*—An allegation, in answer to a complaint on an insurance policy, that the "plaintiff procured to be issued to her a policy of insurance," is equivalent to an allegation of delivery to, and acceptance of such policy by plaintiff. *Sisk v. Citizens' Insurance Co.*, 565.
27. *Answers.—Proof.*—Where there are two paragraphs of answer, one in confession and the other in denial, the plaintiff cannot treat the answer in confession as dispensing with the proof of the facts put in issue by the paragraph in denial. *People's Mutual Benefit Society v. Templeton*, 126.
28. *Answer.*—A paragraph of answer which is pleaded in bar of the entire action is bad where it does not answer the entire complaint. *State, ex rel., v. Tomlinson*, 662.
29. *Answer.—Counterclaim.*—No single pleading can serve the double purpose of an answer and a counterclaim, and when such pleading seeks affirmative relief it will be treated as a counterclaim. *Huber Mfg. Co. v. Busey*, 410.
30. *Answer.—Insurance.*—In an action on a fire insurance policy containing the provision that in case of additional insurance the policy shall be void, unless consent in writing endorsed on the policy is procured from the company, an answer setting up that plaintiff procured additional insurance is sufficient without the further allegations that consent of the company was given in any other manner than in writing, and that such condition in the policy was not waived. *Sisk v. Citizens' Ins. Co.* 565.
31. *Answer, Immaterial Averments.—Proof.*—All allegations in an answer except those essential to constitute a good answer will be regarded as surplusage, and need not be proved. *Kniss v. Holbrook*, 229.
32. *Counterclaim.*—A counterclaim that discloses a right to recover on any of the items declared upon therein is not demurrable. *Anglemyer v. Blackburn*, 352.
33. *Defect of Parties.—Demurrer.*—A demurrer for want of facts does not raise any question as to defect of parties. *Loufer v. Stottlemeyer*, 221.
34. *Defect of Parties.—Waiver.*—A defect of parties if apparent on the face of the pleadings is waived upon failure to demur on that ground. *Ib.*

35. *Demurrer.—Harmless Error.*—Sustaining a demurrer to a bad pleading is a harmless error, although the demurrer is insufficient to test the pleading.

Shepherd v. Marvel, 417; Bell v. Hiner, 184.

36. *Amendment After Close of Evidence and Argument.—Statute Construed.*—Under the provisions of section 894, Burns' R. S. 1894, the court may in its discretion permit amendments to be made to pleadings during the progress of a trial and after the close of the evidence and the conclusion of the argument, unless it affirmatively appears from the record that such amendment was prejudicial to the adverse party and that the trial court abused its discretion.

Diltz v. Spahr, 591.

37. *Specific Averments Control.*—When the specific facts averred, in an action for damages, show that there could have been no damages, such specific averments will control the general allegations of damages.

Williams v. Hanly, 464.

38. *Exhibit.—Foundation of Action.*—A written order mentioned as having been given for the purchase of the article warranted, unless it contains the warranty relied upon, need not be set out as an exhibit in a pleading founded upon a breach of warranty.

Huber Mfg. Co. v. Busey, 410.

39. *Action to Enforce Laborer's Lien.—Estoppel.*—In an action by a laborer to enforce his lien under section 5206, Burns' R. S. 1894, an answer of estoppel counting upon plaintiff's failure to make known his claim is bad, when defendant's want of knowledge of its existence is nowhere alleged.

Bell v. Hiner, 184.

40. *Action Against a Foreign Insurance Company.—Jurisdiction.*—The question of jurisdiction of the court in an action on a policy of insurance issued by a foreign insurance company, brought in the county in which the company had an agent, other than the county in which the plaintiff and the agent issuing the policy resided, can only be raised by a special plea alleging such facts as are necessary to raise that issue.

Ohio Farmers' Ins. Co. v. Stowman, 205.

PRACTICE—A cross-examination may extend to any and all phases of a general subject opened up on direct examination, see WRITNESS, 3; *Gemmell v. State, ex rel., 154.*

1. *Theory.*—Every case must proceed upon some theory; if a complaint is based upon one theory it can not be sustained upon some other.

Indianapolis Union Railway Co. v. Neubaucher, 21.

2. *Harmless Error.—Malicious Prosecution.*—Sustaining a demurrer to a paragraph of answer in an action for malicious prosecution, alleging the existence of probable cause, the non-existence of malice and the good faith of the action, is harmless, as such facts were admissible under the general denial.

Harlan v. Jones, 398.

3. *Harmless Error.*—It is harmless error to sustain a demurrer to a good paragraph of answer when the same defense can be made under another paragraph, although such paragraph was not filed until after the ruling on such demurrer.

Brudi v. Trentman, 512; Kniss v. Holbrook, 229.

4. *Argumentative Denial.—Action on Insurance Policy.*—A paragraph of answer, in an action on an insurance policy, which denies that the policy in suit was issued to plaintiff, amounts to an argumentative denial and is properly overruled as defendant may introduce under the general denial any proof that will meet what plaintiff is bound to prove in order to recover.

Kirshbaum v. Hanover Fire Insurance Co., 606.

5. *Examination of Witness.—Harmless Error.*—The propounding to a witness, of an improper question, where the answer thereto is not responsive and contains no statement as to the issue being tried, is harmless error. *Chicago and Erie R. R. Co. v. Long, 401.*
6. *Examination of Witness.—Leading Questions.*—The use of leading questions in the examination in chief of a witness is within the sound discretion of the court. *Ib.*
7. *Impeachment.*—A question asked for the purpose of impeachment in reference to a conversation with a certain person at a given place which fixes the time of the conversation as "about one year ago" is proper where the exact time cannot be fixed. *Kirshbaum v. Hanover Fire Ins. Co., 606.*
8. *Admission of Evidence.*—It is not error to exclude evidence offered on sur-rebuttal, which evidence was properly admissible in chief to sustain the defense. *Brown v. Hiatt, 340.*

PRESUMPTION—The law will not presume that an insurance company has waived a provision intended for its protection, see *INSURANCE, 13; Sisk v. Citizens' Ins. Co., 565.*

PRINCIPAL AND AGENT—

Liability of Agent.—A local agent for the sale of goods of a manufacturing company who has contracted with his principal to endorse all notes taken from customers for sales made of goods furnished him by such company is not liable for the payment of goods sold by a general agent of the company where the local agent informed the general agent at the time such sale was made that the purchaser was insolvent and that he would not endorse or guarantee such purchaser's note, although he ordered the goods together with other goods, charged himself with same, and notified the purchaser of the arrival thereof.

Springfield Fertilizer Co. v. Tompkins, 403.

PRINCIPAL AND SURETY—Liability of endorser, see *BILLS AND NOTES, 7; Clark v. Trueblood, 98.*

1. *Deed.—Mortgage.—Implied Trust.*—The acceptance by a surety of a deed absolute on its face, but intended as a mortgage to indemnify him against loss by reason of his suretyship, raises an implied trust in favor of his co-sureties, and he holds the property not only as indemnity for himself, but also for his co-sureties. *Kelso v. Kelso, 615.*
2. *Bonds.*—Where duties are imposed upon a principal in a non-official bond, which are not commonly attached to the position which he is filling, and no mention of such unusual or different duties is made in the condition of such bond, the sureties thereon can only be held for the default of the principal in the performance of such duties as are commonly understood to belong to the class of employment by which the principal is designated. *Town of Salem v. McClintock, 656.*
3. *Extension of Liability of Surety by Implication.*—Sureties are favorites of the law and are not bound beyond the terms of the engagement, and their liability cannot be extended by implication beyond the strict terms of the contract. *Ib.*
4. *Decedent's Estates.—Statute Construed.*—Under the provisions of section 2468, Burns' R. S. 1894, that "if a decedent be a surety only in any joint, or joint and several contract or in any judgment founded thereon, his estate shall not be liable for the payment thereof, unless it be shown that the

principal is a nonresident of this State or is insolvent," etc., proof that principal was insolvent at the time of the trial is sufficient to justify a judgment against a decedent's estate on a claim filed against the estate wherein decedent was surety on a promissory note which was the basis of such claim, without showing that payee used due diligence in prosecuting the principal to insolvency, where no notice was given by surety to proceed against principal. *Tremain, Admr., v. Severin, 447.*

PROXIMATE CAUSE—See NEGLIGENCE.

1. *Escape of Natural Gas.—Defective Gas Pipes.*—The bursting of a pipe line used to convey natural gas, the escape of gas therefrom, and the penetration thereof through the earth beneath and into a building adjacent thereto, were the natural and proximate results of the use of weak and inferior gas pipes and allowing gas to flow into them at a high and dangerous pressure.

Alexandria Mining and Exploring Co. v. Irish, Admr., 534.

2. *Negligence May be the Proximate Cause Although not the Immediate Cause.*—The negligence of the defendant must be the proximate cause of the injury, and it is the proximate cause thereof if it can be properly said to have produced the result complained of, in natural and continuous sequence, unbroken by any efficient intervening cause. The negligence charged may be the proximate cause, although not the immediate one; it is enough if it be the efficient cause which set in motion the chain of circumstances leading up to the injury. *Ib.*

PUBLIC INDECENCY—Sufficiency of affidavit, see CRIMINAL LAW; *State v. Cone, 350.*

RAILROAD CROSSING—When traveler is not guilty of contributory negligence in crossing track, see RAILROADS, 6; *Indianapolis Union R. W. Co. v. Neubaucher, 21.*

A person who is injured at a railroad crossing is presumed to be negligent, see RAILROADS, 4; *Ib.*

Failure to operate safety gates at railway crossing as required by a city ordinance is negligence, see RAILROADS, 5; *Ib.*

RAILROADS—

As to who is a passenger, see CARRIERS, 2; *Stalcup v. Louisville, etc., R. W. Co., 584.*

Action for damages caused by fire is assignable, see ASSIGNMENTS; *Baltimore, etc., R. R. Co. v. Countryman, Assignee, 139.*

Measure of damages in an action for permitting fire to escape from right of way, see DAMAGES, 5; *Ib.*

It is negligence to back an engine and cars across a street of a town at the rate of eight miles an hour without giving warning of its approach, see NEGLIGENCE, 4; *Lake Shore, etc., R. W. Co. v. Boyts, 640.*

1. *Complaint.—Immaterial Allegations Need Not be Proved.*—An allegation in a complaint for personal injuries against a union railroad company under whose directions the trains of several different companies are operated, that the train which struck and injured plaintiff was a train of a designated company, is immaterial and need not be proved.

Indianapolis Union R. W. Co. v. Neubaucher, 21.

2. *Damage by Fire.—Complaint.*—In an action against a railroad company for damages caused by fire, a complaint alleging that the defendant negligently permitted a fire to originate on its right of way, and negligently permitted it to escape upon the plaintiff's lands, and to burn the soil and crops thereon, is sufficient to withstand a demurrer. *Chicago, etc., R. R. Co. v. Long, 401.*
3. *Passenger on Freight Train.—Assumption of Risk.*—A passenger on a freight train does not assume the risks growing out of the negligent operation of such train. *Indiana, etc., R. R. Co. v. Masterson, 323.*
4. *Crossing.—Negligence.—Presumption.*—A person who is injured at a railroad crossing is presumed to be negligent; but this presumption is overcome by a general verdict returned by the jury and approved by the trial court. *Indianapolis Union R. W. Co. v. Neubaucher, 21.*
5. *Crossing.—Violation of City Ordinance.—Negligence.*—Failure to operate safety gates at a railway crossing, as required by a city ordinance, is negligence. *Ib.*
6. *Crossing.—Contributory Negligence.*—One is not, as a matter of law, guilty of contributory negligence in failing to wait until a train going in one direction has passed far enough to enable him to see whether a train on an adjoining track is approaching from the opposite direction, where a large number of trains pass the crossing daily and the safety gates are open, indicating that no train is approaching. *Ib.*
7. *Damages by Fire.—Contributory Negligence.—Special Finding.*—A judgment against a railroad company for damages for negligently causing a fire is not sustained by a special finding which fails to find facts showing that the damages resulted without contributory negligence on the part of plaintiff. *Louisville, etc., R. W. Co. v. Porter, 266.*
8. *Passenger on Freight Train.—Contributory Negligence.*—A passenger on a freight train who leaves her seat to get a drink of water for her child is not guilty of contributory negligence so as to preclude a recovery for damages caused by a negligent stopping of the train. *Indiana, etc., R. R. Co. v. Masterson, 323.*
9. *Negligence.—Proximate Cause.*—While the conductor and a brakeman of a train were assisting others in unloading a heavy piano from a freight car, the conductor, who was within the car, stepped into a hole which had negligently been permitted to remain in the floor of the car, and thereby lost his hold on the piano the weight of which was thrown on the brakeman, by reason of which he was injured. *Held,* in an action by the brakeman against the railroad company, that the hole in the car floor was not the proximate cause of the injury and therefore the company was not liable. *Louisville, etc., R. W. Co. v. Southwick, 486.*
10. *Ticket Purchased in One State, Tort Occurring in Another.*—The fact that a passenger purchased his ticket in Illinois does not support the proposition that the company is not liable for a tort in Indiana. *Indiana, etc., R. R. Co. v. Masterson, 323.*
11. *Master and Servant.*—One who is on a railroad train, performing labor without recompense, with the "acquiescence, knowledge, consent, and permission of the conductor and all other persons running and conducting the train" is not a servant toward whom the company owes any legal obligation; it not being shown that the conductor and others in charge of the train were authorized to employ such person to perform the labor in which he was engaged. *Stalcup v. Louisville, etc., R. W. Co., 554.*

REAL ESTATE—As to purchase of lot not described, see **CONTRACTS**, 5; *Emshwiller v. Tyner*, 133.

RECEIVERS—A complaint in an action brought by a receiver must allege that leave of court was obtained to prosecute the action, see **PLEADING**, 24, 25; *Rhodes v. Hilligoss, Rec.*, 478.

REPLEVIN—

1. *As Against a Trespasser*.—Possession of personal property is sufficient to authorize the possessor to maintain replevin against a mere trespasser. *Decker v. Brandt*, 264.
2. *Sheriff.—Power of.—Replevin*.—The power of a sheriff, or his deputy, to seize property by virtue of a writ of replevin issued from the circuit court of his county is confined to property in his own county. *Ib.*

REPUTATION—When specific acts not admissible to prove bad character for chastity, see **EVIDENCE**, 4; *Robertson v. Hamilton*, 328.

SALES—Executory sale of promissory note, see **BILLS AND NOTES**, 4; *Mattix, Admx., v. Leach*, 112.

Of patent right, see **PATENTS**, 1, 2; *Eclipse Wind Engine Co., v. Zimmerman Mfg. Co.*, 496.

A mortgagee must account to a junior mortgagee for the excess of a sale of the mortgaged goods to pay his mortgage and expenses incurred, see **MORTGAGES**, 1; *Stewart, Exx., v. Long*, 164.

1. *Contract*.—An agreement by which A was to furnish to B a music box with a dropslot attachment, B to remit each week the collections therefrom, making up the amount to a certain sum if below that, until he had remitted \$250, at which time B was to own the box, with an option to A in case of default to sue for the balance due, or to refund one-half of the collections remitted and retake the box, is a contract of sale and purchase on which the first party can sue in case of a default in payment for the unpaid balance of the contract price. *Beist v. Sipe*, 4.
2. *Warranty.—Waiver of Notice*.—Where a manufacturer, through a local agent sold a harvesting machine, warranting same to do good work, such warranty containing the condition that if the machine did not do good work the purchaser to give immediate notice thereof in writing, both to the agent from whom he received the machine and to the manufacturer; the local agent was present at a trial of the machine at which it failed to work, and told the purchaser to try it again, and if it still failed to work to return it; such statement by the agent constituted a waiver of the written notice provided for in the warranty. *J. F. Seiberling & Co. v. Newlon*, 374.
3. *Breach of Contract by Purchaser.—Seller's Remedy.—Notice*.—The seller, in an executed sale not accompanied by delivery, has his choice of two remedies. He may retain the property for the benefit of the purchaser, and subject to his orders, and sue for the entire purchase price; or he may resell the goods and recover from the purchaser the difference between the contract price and the price of sale. But if the latter course be pursued, the seller, except under peculiar circumstances, for example, where the goods

are of a perishable nature, is required to give the purchaser a preliminary notice of the time and place of resale.

Ridgley v. Mooney, 362.

4. *Breach of Contract.—Measure of Damages.*—In an action by the seller against the purchaser of personal property for a breach of the contract, where the title to the property had never passed to the purchaser, the measure of damages is the difference between the price fixed by the contract and the market value of the property at the time and place of delivery. *Ib.*
5. *Pleading.—Complaint.—Breach of Contract.*—R entered into a contract with M by which R agreed to furnish M 500 cords of bark on or before November 1, 1893, the price to be governed by the ruling price in Cincinnati in the spring months of 1893, and such additional sum as it would require to deliver the bark to Columbus, Ind., over and above what it would cost to deliver the bark to Cincinnati. R prepared for market the 500 cords of bark, and at the time for delivery notified M that he was ready to ship the same; whereupon M repudiated the contract. *Held*, that R's complaint declaring upon a breach of the contract, averring that R, after the breach, sold the bark for the best price attainable, which was a specified sum less than he would have realized but for the breach, but does not allege the market value at Columbus when the default was made, or the expense of shipment and sale, is not sufficient to withstand a demurrer. *Ib.*

SEARCH WARRANT—Procuring a search warrant to be issued may be made the foundation of an action for malicious prosecution, see **MALICIOUS PROSECUTION**; *Harlan v. Jones, 398.*

SHERIFF—Jurisdiction of sheriff in seizure of property under writ of replevin. see **REFLEVIN**, 2; *Dederick v. Brandt, 264.*

SLANDER—In an action for slander brought by a married woman, based upon a statement of the defendant that the plaintiff had been guilty of adultery, the husband's statement to a third party in the absence of plaintiff that his wife admitted to him the guilt is not admissible, see **EVIDENCE**, 5; *Robertson v. Hamilton, 328.*

SLEEPING-CAR COMPANIES—

1. *Not Liable as an Insurer of Baggage.*—Sleeping-car companies are not liable as insurers of wearing apparel and effects belonging to passengers upon their cars, as innkeepers would be liable, or as common carriers are held liable for baggage intrusted to them, while the passengers are occupying the berths assigned them, and are themselves in charge of their baggage. *Voss v. Wagner Palace Car Co., 271.*
2. *When Responsible for Baggage as a Common Carrier.*—Where a passenger of a sleeping-car delivers his baggage to the porter of the car to be by him carried from the car to the reception room of the depot, and such porter undertakes to do so and takes the same into his possession, the sleeping-car company becomes responsible as a common carrier for the safe delivery of such baggage. *Ib.*
3. *Negligence.—Notice Posted in Car.*—A sleeping-car company can not relieve itself from liability for the loss, by its negligence, of the effects of a passenger, by posting up in the car a notice by which it attempts to relieve itself of such liability; especially where such notice is not brought to the knowledge of the passenger. *Ib.*

4. *Porter in Charge of Baggage While Acting Within Scope of his Employment, Not a Gratuitous Bailee.*—A porter of a sleeping-car, acting under the rules and customs of the company and within the scope of his employment, who undertakes to deliver the baggage of a passenger from the car to the depot is not a mere gratuitous bailee. *Ib.*

5. *Loss of Baggage.—Negligence or Dishonesty of Employees.*—A sleeping-car company is liable for the value of a passenger's cape which a porter in accordance with the rules of the company undertook to remove at the passenger's destination, and which by reason of the negligence or dishonesty on his part, or that of another employe was lost or stolen. *Ib.*

SPECIAL FINDING—Must show, in an action against a railroad company for damages for negligently causing a fire, that plaintiff was free from contributory negligence, see **RAILROADS**, 7; *Louisville, etc., R. W. Co. v. Porter*, 266.

Failure to enter judgment on at the term of court the finding was made and filed, see **JUDGMENT**, 2; *J. F. Seiberling & Co. v. Newlon*, 374.

Failure to Find Fact Proved.—Remedy.—New Trial.—Where there is an omission from the special findings of the court of an essential fact proved at the trial, the proper remedy is a motion for a new trial and not by exceptions to the conclusions of law.

Allen v. Rice, 672.

SPECIAL VERDICT—See **VERDICT**.

Must contain a finding of every ultimate fact, see **VERDICT**, 6; *Alexandria Mining and Exploring Co. v. Irish, Admr.*, 534.

Facts found in, which are not within the issues must be disregarded, see **VERDICT**, 5; *Brudi v. Trentman*, 512.

Every fact essential to support a recovery in favor of plaintiff must be found before a judgment can be rendered in his favor, see **VERDICT**, 4; *Rarey v. Lee*, 121.

Sufficiency of in an action for damages for diverting water from its natural course, see **DAMAGES**, 2; *Ib.*

As to finding of residence of mortgagors of a chattel mortgage, see **VERDICT**, 8; *State, ex rel., v. Griffin*, 555.

When not ambiguous in an action on a promissory note, wherein payment and statute of limitations were pleaded in defense, see **VERDICT**, 9; *Brudi v. Trentman*, 512.

When not necessary that special verdict show date of the death of deceased for which suit was brought, see **VERDICT**, 7; *Alexandria Mining and Exploring Co. v. Irish, Admr.*, 534.

When need not show that deceased had knowledge of the danger, in an action for death from explosion of natural gas, see **VERDICT**, 10; *Ib.*

When does not state sufficient facts upon which the court can properly base a conclusion, in an action for damages against a railroad company for negligently permitting fire to escape from its right of way, see **VERDICT**, 11; *Luhr v. Michigan Central R. Co.*, 562.

Variance between special verdict and complaint as to location of house in which explosion occurred, in an action against a natural gas company for death caused by a natural gas explosion, is immaterial, see VERDICT, 12; *Alexandria Mining and Exploring Co. v. Irish, Admr.*, 534.

STATUTE OF FRAUDS—An oral promise by a corporation to pay the remainder of purchase money of land, purchased for such corporation by one who takes the title in his own name, giving back a note and mortgage for the balance of the purchase price, is not within the statute of frauds, see CONTRACTS, 10; *Bedford, etc., R. W. Co. v. Winstandley*, 143.

STATUTORY CONSTRUCTION—As to preferred claims of laborers, see LIENS, 1, 2, 3; *Bell v. Hiner*, 184.

As to amendment of pleading after close of evidence and argument, see PLEADING, 36; *Diltz v. Spahr*, 591.

As to notes given for patent right, see BILLS AND NOTES, 1, 2; *Lofland v. Goben*, 67; *Kniss v. Holbrook*, 229.

As to collection of penalty for failure to pay interest on school fund loan, see OFFICERS, 1; *Coleman v. Goben*, 346.

When party in interest may be admitted as a party defendant in an action on an insurance policy under section 274, Burns' R. S. 1894, see PARTIES; *Kirshbaum v. Hanover Fire Ins. Co.*, 606.

As to failure of natural gas company to test its pipes, see NATURAL GAS, 2; *Alexandria Mining and Exploring Co. v. Irish, Admr.*, 534.

As to revival of action barred by statute of limitations, see LIMITATION OF ACTIONS, 3; *Brudi v. Trentman*, 512.

As to the right to remonstrate in a proceeding to vacate a highway, see HIGHWAYS, 3; *Brandenburg v. Hittel*, 224.

As to a wife's right to her own earnings, see HUSBAND AND WIFE, 3; *Arnold, Admr., v. Rifner*, 442.

As to liability of bondsmen of a saloonkeeper for damages resulting from sale of liquor to minor, see INTOXICATING LIQUORS, 2, 3; *Reath v. State, ex rel.*, 146.

As to the powers of a special administrator, see EXECUTORS AND ADMINISTRATORS, 2; *State, ex rel., v. Tomlinson*, 662.

As to right of agent of decedent to testify, see EVIDENCE, 1; *Tremain, Admr., v. Severin*, 447.

As to record of chattel mortgage, see CHATTEL MORTGAGES, 1; *State, ex rel., v. Griffin*, 555; *Morris v. Ellis*, 679.

As to action on official bond, see BOND; *Leavell v. State, ex rel.*, 72.

Liability of decedent as surety, see PRINCIPAL AND SURETY, 4; *Tremain, Admr., v. Severin*, 447.

Of statute providing that on appeal it shall not be necessary to embrace the entire record, see APPEAL AND ERROR, 19; *Geiger, Tr., v. Hunneke*, 326.

1. An amendatory statute which simply defines the same of-

fense in substantially the same language as that used in the statute amended does not take away the right of prosecution under the amended statute for an offense committed before the act as amended became effective. *State v. Hardman, 357.*

2. *Saving Clause.*—The provisions of section 248, Burns' R. S. 1894, that the repeal of a statute shall not have the effect to repeal or extinguish any penalty, forfeiture, or liability incurred thereunder, are by law imported into the subsequent repealing acts and obviate the necessity for individual saving clauses. *Ib.*
3. *Repealing Acts.—Penalty.*—The provision of section 248, Burns' R. S. 1894, that "the repeal of a statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide," applies to penal statutes imposing punishment by imprisonment, and the word "penalty" is not restricted to a pecuniary liability. *Ib.*

STREET RAILWAYS—As to injury of passenger alighting from car, see CARRIERS, 1; *Ferguson v. Citizens' Street R. W. Co., 171.*

STREETS—See HIGHWAYS.

A public highway when annexed to a town becomes a street, see HIGHWAYS, 1; *Brown, Exr., v. Hines, 1.*

Duty of traveler who has knowledge of defect in street, see MUNICIPAL CORPORATIONS, 3; *Town of Salem v. Walker, 637.*

Duty of municipality to keep streets in reasonably safe condition, see MUNICIPAL CORPORATIONS, 1, 2; *Ib.*

SUMMONS—Sheriff's return not conclusive that summons was served, see JUDGMENT, 1; *Shepherd v. Marvel, 417.*

TENDER—

1. *When Must Include Attorney's Fees.*—Tender of the amount due on a promissory note must include attorney's fees, when the note calls for such fees, and is in the hands of an attorney for collection, and there is a dispute about the amount due.

Rouyer, Admx., v. Miller, 519.

2. *When Need Not Include Attorney's Fees.*—Where tender is sought to be made by the maker of a note of the full amount thereof, and the holder of such note should refuse to give information concerning the attorney's fees when called for, or should the debtor be ignorant of the employment of the attorney, or the tender be refused upon other grounds, and he be thereby misled, the court would doubtless protect the debtor in making such tender. *Ib.*

TOWNS—See MUNICIPAL CORPORATIONS.

TRESPASS—

Venue.—An action of trespass for an injury to real estate must be brought in the county where the real estate is situated.

Grace v. Cox, 150.

TRIAL—

1. *Burden of Proof.—Right to Open and Close.*—Where no issue is formed on the complaint, and the only issue is upon a counterclaim filed by the defendant, the defendant has the burden of proof, and has the right to open and close. *Brower v. Nellis, 183.*

2. *Right to Open and Close.*—Whenever the plaintiff has any proof to make either, as to the facts necessary to establish a case, or as to the amount of damages recoverable, he is entitled to the open and close. *Rouyer, Admx., v. Miller, 519.*

3. *Conflict Between General Verdict and Answers to Interrogatories.*—Answers to interrogatories control the general verdict only when the antagonism between them is so great that it cannot be removed by any evidence admissible under the issues. *Ib.*

VENUE—Change of in an action to compel administrator to pay claim, see **EXECUTORS AND ADMINISTRATORS**, 1; *Everroad, Admr., v. Lewis*, 65.

An action of trespass for injury to real estate must be brought in the county where the real estate is situated, see **TRESPASS**; *Grace v. Cox*, 150.

1. *Application for Change of, Made After Time Fixed by Rule of Trial Court.*—It is not error for the trial court to refuse a change of venue on the ground of local prejudice when the application is made after the time fixed by a rule of the court requiring the application in civil causes returnable on or after the fourth day of the term, and providing that applications subsequently made will not be entertained. *Leavell v. State, ex rel.*, 72.
2. *Application for Change of Venue Made by One of Several Co-parties.*—A defendant cannot complain of the denial of the application for a change of venue on the ground of local prejudice, made by a co-defendant alone, although the affidavit states that the latter makes the motion for all the defendants. *Ib.*
3. *Application for Change, After Time Fixed by Rule of Trial Court.*—It is not error for the trial court to refuse a change of venue when the application is made after the time fixed by a rule of the court. *Anglemyer v. Blackburn*, 352.

VERDICT—See **SPECIAL VERDICT**.

Answers to interrogatories control the general verdict only when the antagonism between them is so great that it cannot be removed by evidence admissible under the issues, see **TRIAL**, 3; *Rouyer, Admr., v. Miller*, 519.

1. *Presumption.*—Every presumption is in favor of the general verdict. *Indianapolis Union R. W. Co. v. Neubaucher*, 21.
2. *Interrogatories.*—Where the evidence is not in the record, the answers to interrogatories will not be allowed to overthrow a general verdict, unless there is such antagonism upon the face of the record as is beyond any possibility of being removed by any evidence legitimately admissible under the issues. *Ib.*
3. *Special Verdict—Should Find Facts Only.*—A special verdict should find the facts essential to a recovery, and not mere conclusions of law. *Luhr v. Michigan Central R. R. Co.*, 562.
4. *Special Verdict.*—A special verdict must find every fact essential to support a recovery for the plaintiff before a judgment can be rendered in his favor. *Rarey v. Lee*, 121.
5. *Finding of Facts not Within the Issues.*—Facts found in a special verdict which are not within the issues and evidence bearing thereon, are irrelevant and must be disregarded. *Brudi v. Trentman*, 512.
6. *Special Verdict Must Contain a Finding of Every Ultimate Fact.—Evidentiary Facts Disregarded.*—A special verdict must contain a finding of every ultimate fact necessary to a recovery before a judgment rendered upon it will stand; evidentiary facts

and facts beyond the issues must be disregarded and nothing will be taken by intendment.

Alexandria Mining and Exploring Co. v. Irish, Admr., 534.

7. *Special Verdict.—Not Necessary That Verdict Show Date of Death of Deceased.*—Where there was no issue as to the operation of any statute of limitations, it is immaterial that a special verdict does not show with certainty that the death of plaintiff's intestate, for which suit was brought, did not occur on the day alleged in the complaint. *Ib.*

8. *Special Verdict.—Residence of Mortgagors.*—A special verdict which makes no finding as to the residence of the mortgagors of a chattel mortgage, except the recitals in the mortgage, a copy of which mortgage is set out in the finding, does not sufficiently find the fact of such residence, so as to bind others than the parties thereto. *State, ex rel., v. Griffin, 555.*

9. *Special Finding.—When not Ambiguous.*—In an action on a note to which defendant pleaded the statute of limitations, and that a certain payment made thereon was made in accord and satisfaction and full settlement of the note, a finding by the jury that "the defendant on December 8, 1886, paid in money to the plaintiff or his agent the sum of \$400 as a payment on said note, and not otherwise," sufficiently shows that the payment was not made by way of compromise or settlement or in accord and satisfaction. *Brudi v. Trentman, 512.*

10. *Knowledge on Part of Injured Party of Danger.—Gas Escaping from Pipes.—Death from Explosion of Natural Gas.*—A special verdict in an action against a natural gas company for the death of plaintiff's intestate resulting from an explosion of natural gas in a building occupied by intestate as a barber shop, which shows that the deceased was lawfully occupying such building, and which fairly discloses that deceased was free from fault, need not find that deceased had no knowledge of the dangerous and defective condition of defendant's pipe lines and did not know that the same had burst and gas was escaping therefrom.

Alexandria Mining and Exploring Co. v. Irish, Admr., 534.

11. *Negligence.—Fire Escaping from Railroad Right of Way.*—A special verdict which finds that a railroad company negligently permitted combustibles to accumulate upon its right of way, and so negligently operated its engine that large coals of fire were negligently dropped therefrom setting fire to such combustibles, which fire was negligently permitted to escape upon plaintiff's land, etc., does not state sufficient facts upon which the court can properly base a conclusion that the railroad company failed to perform its duty in the premises through the want of due care.

Luhr v. Michigan Central R. R. Co., 562.

12. *Variance Between Special Verdict and Pleading.*—In an action against a natural gas company for death caused by an explosion of natural gas which had escaped from the company's pipes in the street, an averment in the complaint that the house in which the explosion occurred was located on the west side of the street and a finding in the special verdict that such house was on the east side of the street do not constitute a material variance.

Alexandria Mining and Exploring Co. v. Irish, Admr., 534.

WAIVER—A denial by an insurance company of all liability on a policy operates as a waiver of proof of loss, see **INSURANCE**, 14; *Aetna Ins. Co. v. Strout, 160.*

WARRANTY—When a condition in a warranty providing that purchaser of article warranted give immediate notice of defect to manufacturer and to selling agent is waived by such agent, see *SALES*, 2; *J. F. Seiberling & Co. v. Newlon*, 374.

WATERS AND WATERCOURSES—Diverting water from its natural course, see *DAMAGES*, 1, 2; *Rarey v. Lee*, 121.

WITNESSES—The use of leading questions in the examination in chief is within the sound discretion of the court, see *PRACTICE*, 6; *Chicago, etc., R. R. Co. v. Long*, 401.

Asking an improper question in the examination of a witness is harmless error where the answer thereto is not responsive and contains no statement as to the issues being tried, see *PRACTICE*, 5; *Ib.*

It is improper to ask an expert witness to give an opinion based upon recollection of the testimony of another witness, see *EVIDENCE*, 10; *Bedford, etc., R. W. Co. v. Palmer*, 17.

Impeachment of as to a conversation had, see *PRACTICE*, 7; *Kirschbaum v. Hanover Fire Ins. Co.*, 606.

1. *Competency of Widow of Deceased*.—The widow may testify as a witness in an action brought by the administrator for the negligent killing of her husband.

Alexandria Mining and Exploring Co. v. Irish, Admr., 534.

2. *Expert Testimony*.—*Life Insurance*.—One who has been an agent and doing business for a life insurance company for eight years, and has been supplied by his company with tables giving the expectancy of life which he has used in his business, is competent to testify as an expert as to the expectancy of the life of a given person.

Clark County Cement Co. v. Wright, Admr., 630.

3. *Cross-Examination, Scope Of*.—When on direct examination a general subject is opened up, the cross-examination is not confined to matters particularly brought by the original examination, but may extend to any and all phases of that subject.

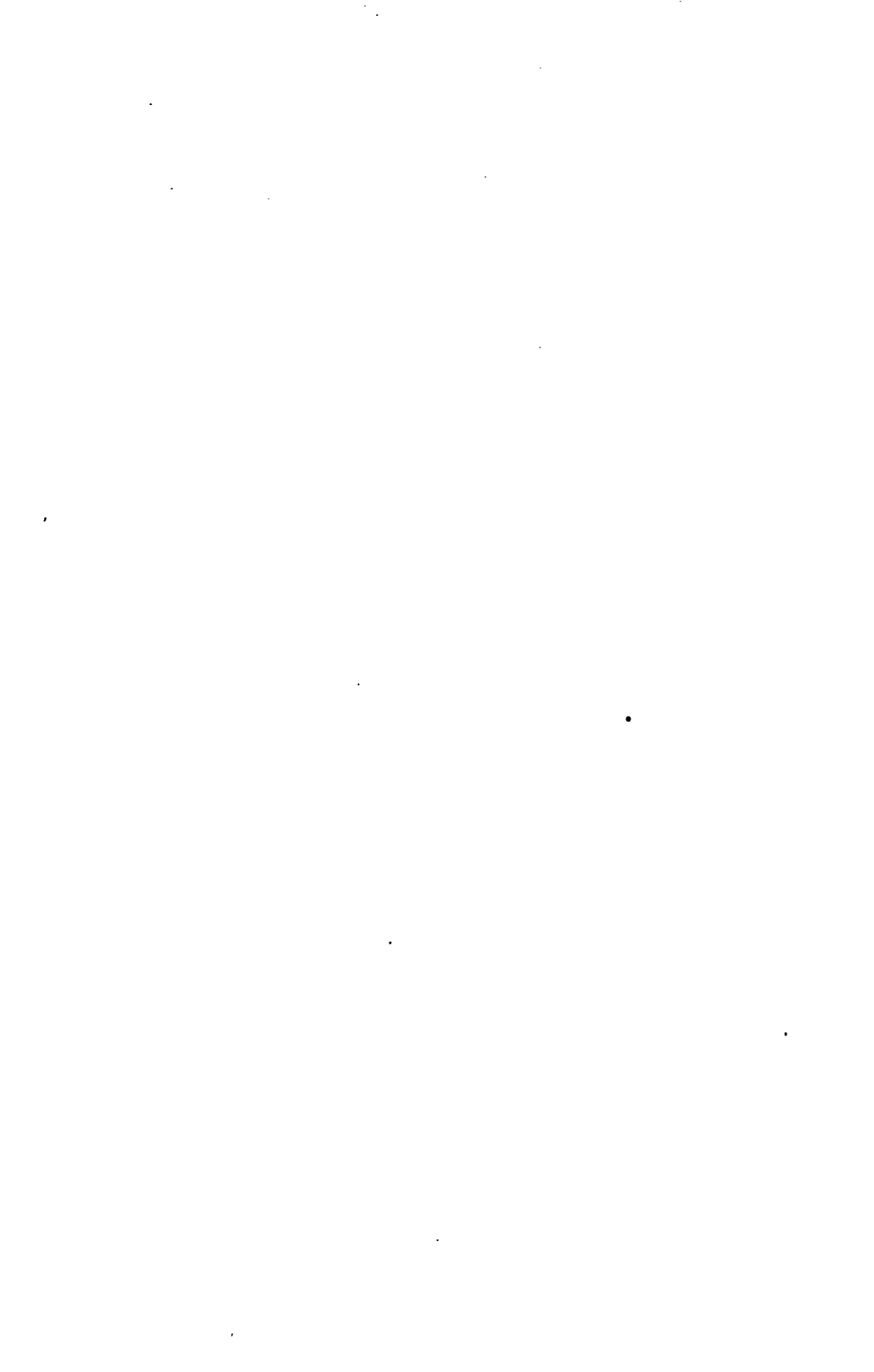
Gemmill v. State, ex rel., 154.

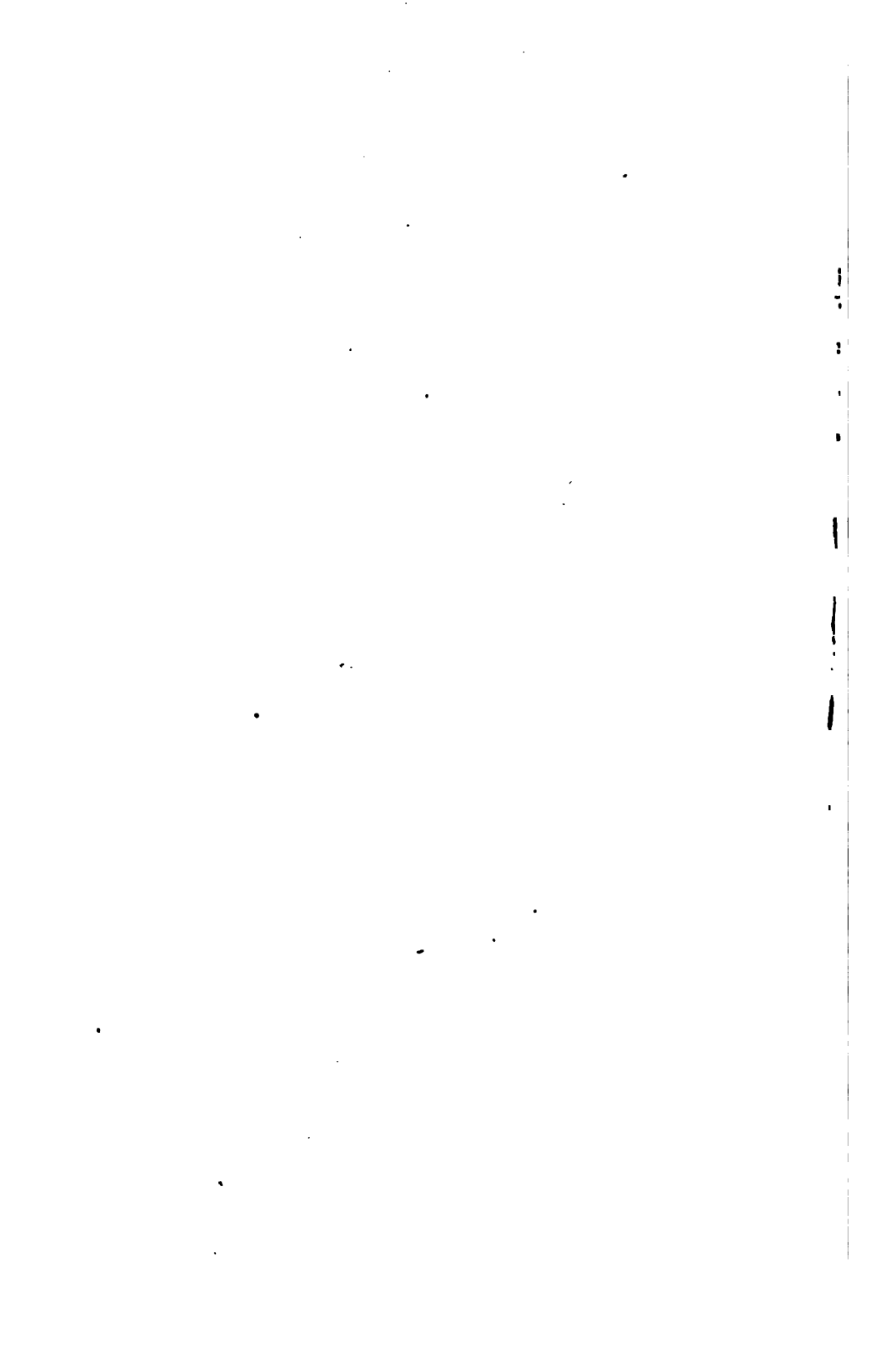
4. *Impeachment*.—A witness who had lived for many years in a neighborhood from which he had moved four months before giving his testimony, may be impeached by showing his reputation in such neighborhood. *Ib.*

WORK AND LABOR—As to claim for against decedent's estate, see *CONTRACTS*, 9; *Purviance, Admr., v. Shultz*, 94.



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